

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

744

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,516

JEROME W. LOFTY,

Appellant,

v.

RUTH COLEMAN MARTHINSON,
EXECUTRIX OF THE ESTATE OF
DETLOW M. MARTHINSON,
and
RUTH COLEMAN MARTHINSON,

Appellees.

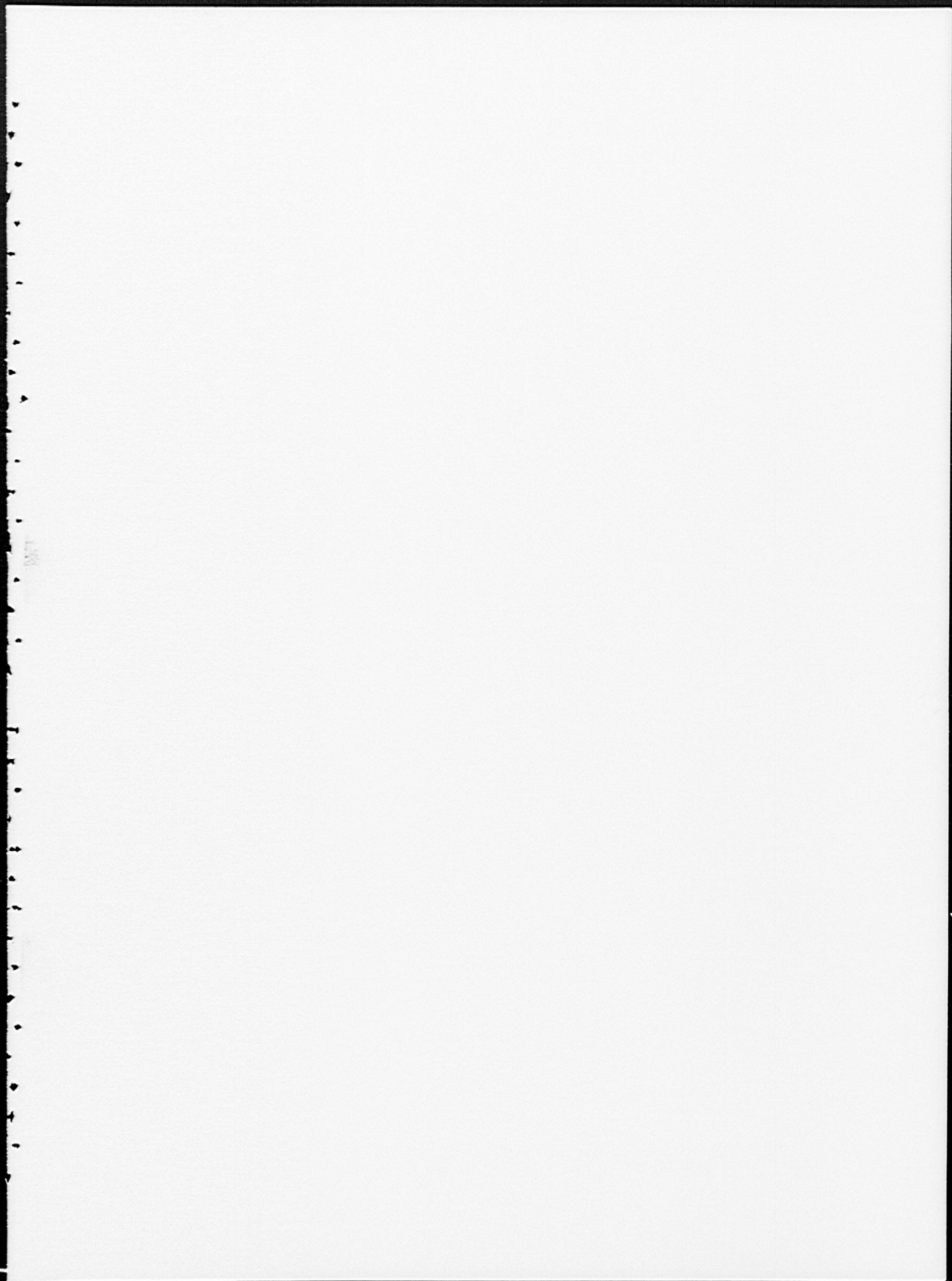
Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

APPENDIX

FILED FEB 9 1970

Nathan J. Paulson
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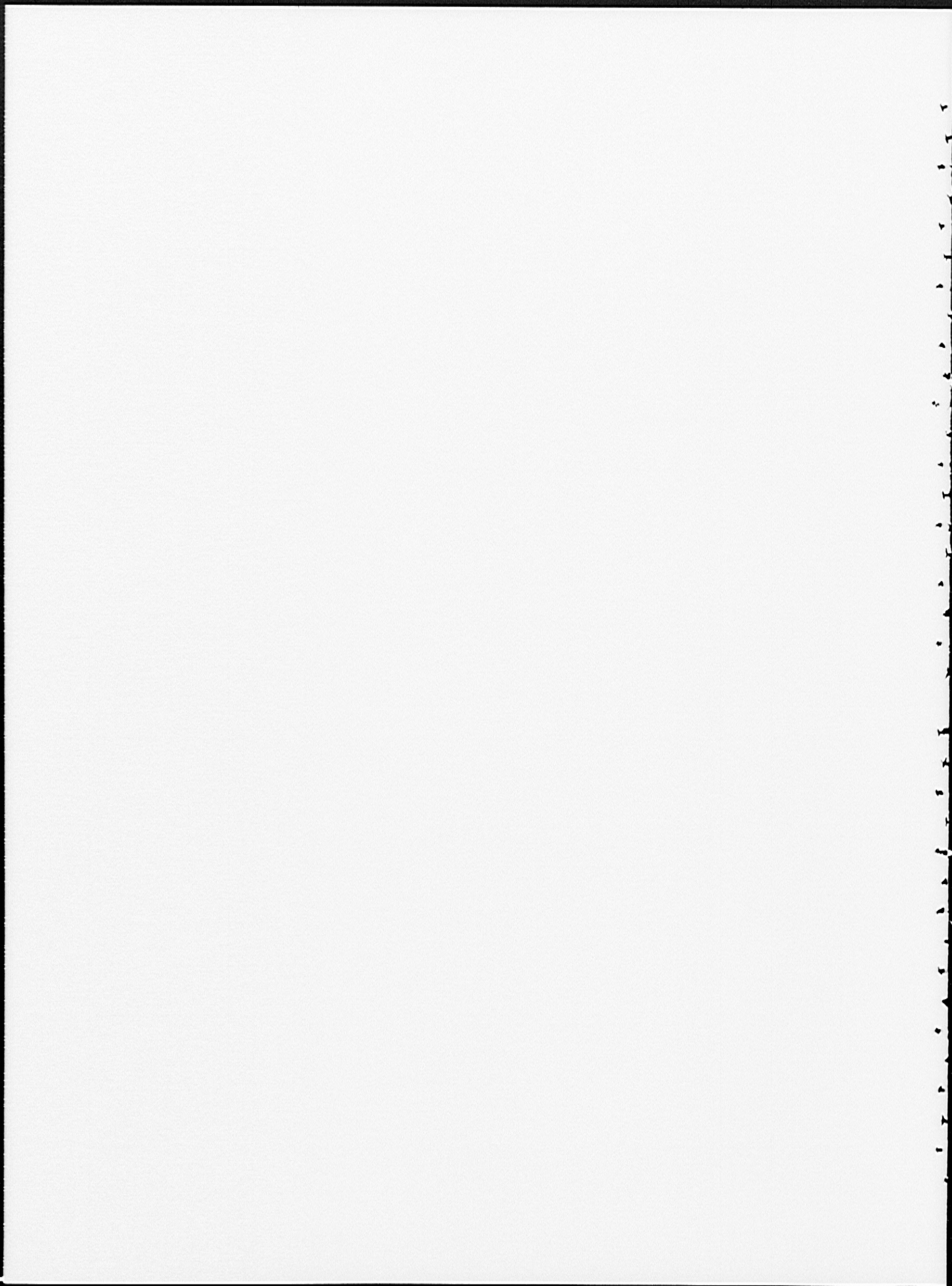
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APPENDIX

[Filed October 28, 1966]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JEROME W. LOFTY,
1240 Delafield Place, Northwest,
Plaintiff,

vs.

No. 940-65

RUTH COLEMAN MARTHINSON
Executrix of the Estate of
Detlow M. Marthinson, Deceased,
2506 Upton Street, Northwest,

and

RUTH COLEMAN MARTHINSON,
2506 Upton Street, Northwest,
Defendants.

FIRST AMENDED AND SUPPLEMENTAL COMPLAINT (For Personal injuries)

1. Jurisdiction is based on the fact that the matter in controversy involves over Ten Thousand Dollars (\$10,000.00), exclusive of costs and interest and both the plaintiff and the defendants are residents of the District of Columbia.

2. Plaintiff is an employee of the Post Office Department of the Federal Government. On February 20, 1964, plaintiff was stationed at the Cleveland Park Branch of the Washington Post Office, 3430 Connecticut Avenue, Northwest in the District of Columbia and had the duty of delivering mail to the residence of the defendants, said defendants owning the said premises, 2506 Upton Street, Northwest in the District of Columbia, being Lot 3, in Square

26 in the Land Records of the District of Columbia with improvements thereon, as tenants by the entireties with right of survivorship, the said Ruth Coleman Marthinson being the surviving joint tenant.

3. Plaintiff delivered defendants' mail through a mail slot in the door, which mail slot violated the specifications of Title 39, Postal Service, Code of Federal Regulations, Section 45.4 (Mail Receptacles) and which the defendants had negligently allowed to operate in a dangerous manner so as to make it unsafe for postal carriers.

4. As a result of defendants' negligence, the front flap of the mail slot closed upon the hand of the plaintiff as he withdrew it, severing completely the plaintiff's right middle distal phalanx.

5. Further, after plaintiff left the defendants' residence, the defendant, Detlow M. Marthinson with the knowledge and consent of the defendant, Ruth Coleman Marthinson, took the amputated portion of the plaintiff's finger and negligently and with wanton and reckless disregard of his actions threw it into the mud and dirt of his front yard.

6. As the result of this further action on the part of the defendant, Detlow M. Marthinson, which was with the knowledge and consent of the defendant, Ruth Coleman Marthinson, the process of treatment of plaintiff's injury was much more difficult and time consuming, causing plaintiff much more pain and suffering than otherwise.

7. As a result of defendants' actions and negligence, plaintiff has suffered permanent disability equivalent to fifty (50%) percent partial loss of the right second finger. Plaintiff has suffered loss of compensation, great pain and suffering, inconvenience, loss of outside hobbies and interest, and great mental anguish and distress.

WHEREFORE, plaintiff demands judgment against the defendants for compensation and punitive damages in the sum of Fifty Thousand Dollars (\$50,000.00) and costs.

MacCRACKEN, COLLINS & HAWES
1000 Connecticut Avenue, N. W.
Phone: 296-5494

/s/

PHILIP R. COLLINS

/s/

URBAN A. LESTER
Attorneys for Plaintiff

Plaintiff hereby demands a jury trial.

/s/

PHILLIP R. COLLINS

/s/

URBAN A. LESTER
Attorneys for Plaintiff

[Certificate of Service October 28, 1966]

[Filed November 7, 1966]

ANSWER TO FIRST AMENDED AND SUPPLEMENTAL COMPLAINT

First Defense:

The Complaint fails to state a cause of action upon which relief may be granted.

Second Defense:

The Defendants admit that the amount sued for is within the jurisdictional limits of this Court, and they admit that the Defendants are residents of the District of Columbia. The Defendants admit the ownership of the premises as alleged on the date as alleged. The Defendants have no knowledge of the allegations as set forth in Paragraph Three of the Complaint and, therefore, deny same. The Defendants deny that the mail slot was in violation of any regulations or that they had negligently allowed it to operate in a dangerous manner or that it was unsafe. The Defendants deny all of the allegations as set forth in Paragraph Four of the Complaint. The Defendants deny all of the allegations as set forth in Paragraphs Five and Six of the Complaint. The Defendants admit that the Plaintiff was injured on the date as alleged, but they do not have sufficient information with respect to the injuries and, therefore, deny same, and deny all allegations not specifically admitted herein.

The Defendants specifically deny that they threw a portion of the Plaintiff's finger into mud or dirt.

Third Defense:

The injury complained of was caused by the sole or contributory negligence of the Plaintiff herein, who had the exclusive control of the operation of the mail slot.

Galiher, Stewart, & Clarke

By: /s/

WILLIAM H. CLARKE
Attorney for Defendants
1215 Nineteenth Street, N. W.
Washington, D. C. 20036
Federal 7-8330

[Certificate of Service November 4, 1966]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS
 IN THE
 UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA CIRCUIT

JEROME W. LOFTY,

Plaintiff,

v.

Civil Action 940-65

RUTH COLEMAN MARTHINSON,
 executrix of the last will of
 DETLOW M. MARTHINSON, deceased,

RUTH COLEMAN MARTHINSON,
Defendant.

Washington, D. C.

Monday, February 24, 1969.

The above-entitled matter came on for hearing before the Honorable
 CHARLES F. McLAUGHLIN, Justice and a Jury, in the United States District
 Court for the District of Columbia, Washington, D. C., Monday, February 24,
 1969, at 10:00 o'clock, A.M.

* * * * *

PROCEEDINGS

JEROME W. LOFTY

* * * * *

DIRECT EXAMINATION

[By MR. COLLINS:]

Q. Will you state your full name? A. My full name is Jerome Wesley Lofty.

* * * * *

Q. Where did you go to school here? A. McKinley Technical High.

Q. Did you matriculate to a university? A. Yes, sir, I did.

10 Q. Where was it? A. Howard University.

Q. How long did you stay at Howard University? A. Two years.

Q. When you were at Howard University, were you employed at all?

A. Parttime.

Q. Where were you employed? A. Carl A. and John McKinney.

Q. After you left Howard, what was your next employment? A. My next employment was with the United States Post Office Department.

Q. How did you attain that employment? A. I took the first substitute clerk carrier's examination.

Q. Were you appointed in one of those positions? A. Yes, I was.

Q. In what position? A. Substitute carrier.

Q. About when were you appointed substitute carrier? A. Around the 22nd of August, 1963.

Q. Were you so employed as a substitute carrier on the 20th day of February, 1964? A. Yes, I was.

11 Q. At what station, sir? A. Cleveland Park.

Q. Where is that located? A. 3430 Connecticut Avenue.

Q. What were your duties at this Cleveland Park Station? A. My duties at the Cleveland Park Station was a substitute carrier. That is one who carries routes for the regular carriers.

Q. What do you mean, "One who carries routes for the regular carriers?"
A. Routes put in cases by regular postman who has a day off.

Q. What do you mean, case or cage? A. Case. The mail is cased at a small table in a wicket 12 inches apart and the magazines right beside it.

Q. How would you, as a substitute carrier, get to this mail? A. Well, the regular mail carrier.

Q. How would he get his mail? A. The regular mailman would case the mail in the morning. The regular supervisor said I would carry route such and such, which indicated a man would get off five hours such and such a day, or a blood donor.

Q. Did you pick up a route in that manner, or how did you get a route on that day? A. February 20th, I was carrying Route 843, on which route
12 Mrs. Marthinson lived. Mr. Samon wanted to get off a half a day. I was assigned to the route.

Q. How did you get out on this route? Did you get out by vehicle or walk to the route? A. 843 is the only mounted route in Cleveland Park. That is, it has a truck.

Q. Where does that route lie at the Cleveland Park Station? A. The route was at Rock Creek Park near Massachusetts Avenue and 32nd Street and goes all the way to 44th and that is Rock Creek Park and Military Road.

Q. When did you start on this route with your vehicle? A. 8:30, 20 minutes to 9:00.

Q. About what time did you arrive at the 4500 block of Upton Street, N. W.? A. Around 1:10.

Q. What happened when you came to 4506 Upton Street, N. W.? A. Well, I parked my truck.

Q. I beg your pardon 2506. A. I parked my truck in front of 2506 Upton Street, N. W. secured the mail I had for Mrs. Marthinson, got the magazine, and as I walked down the steps in front of her house, I pushed the mail through the slot.

13 Q. Let me stop you. Is the house near the street? A. There is a walkway off the sidewalk.

Q. Do you walk straight on the sidewalk? A. You walk down four steps, and I guess six feet from the bottom step to the house.

Q. Is the bottom of the door plumb with the sidewalk, or is there a step there? A. There is a five-inch stoop.

Q. Is the mail slot in the door, or is it in the side of the house, or is there a mail box at 2506 Upton Street, N. W.? A. At 2506, there is a slot in the center of the door approximately 37 inches from the stoop, from the five-inch high stoop.

Q. Is there any writing on that mail slot? A. Yes, there is.

Q. What does the writing say? A. Papers.

Q. On this particular day, what did you do when you came to the door of 2506 Upton Street, N. W.? A. As I came through the door, I prepared the mail to be pushed through the slot. As I pushed the mail through the slot, I wanted to be sure all of the mail had completely cleared the door, because there is a regulation that all of the mail has to be through the mail slot because of the thefts.

14 As I cleared the slot to make sure all of the mail went inside the house, the flap stuck and as I was pulling my hand out, the mail slot fell on my finger.

Q. What did you do? A. It severed my finger.

Q. What did you do? A. Apparently I was making some noise because Mr. Marthinson came to the door and my finger was bleeding, and he said, "Can I get some Micrin to put on your finger?" I said, no. I didn't want any Micrin put on my finger because it burns.

Q. Was your finger bleeding? A. It was bleeding all over my uniform.

Q. Did you get back in your truck? A. I got back in my truck, and I headed back to the Post Office, driving the truck with my left hand.

Q. Are you left handed or right handed? A. Right handed.

Q. Did you go to the hospital, or to the Cleveland Park Station, or where did you go? A. I went to the Cleveland Park Station, off the hallway on Connecticut Avenue.

Q. Did you see anyone? A. Mr. Manoff, the supervisor at that time.

15 Q. Were you in pain at that time? A. By all means. The finger was swollen, aching and bleeding. When I went to the desk, Mr. Manoff asked me did I hurt myself, and I said I cut my finger off in the mail slot at 2506 Upton Street, N. W.

Q. Did he give it all his attention? A. He said to get some hospital attention immediately and designated someone to take me to the hospital.

Q. Did he appoint someone to take you to the hospital? A. Mr. Edward Smith.

Q. Where did you leave your vehicle there at the Post Office in Cleveland Park? A. I left my vehicle right in front of the Post Office at Connecticut Avenue.

Q. Is that the regular place where you park your vehicle? A. No, in back of the post office in the parking lot for small vehicles.

Q. How did you enter the post office, at the front or the rear? A. The main entrance for the regular customers, but there is a door that only the letter carriers go in, to get to the back of the room.

Q. Was Mr. Manoff in the front where the customers usually come, or in the back of the post office? A. In the back of the post office.

16 Q. Did Mr. Smith immediately take you to a hospital, take you some place else or what happened after you got out of the post office? A. After I got out of the post office, Mr. Smith said, "Mr. Lofty, you have lost a little more of your finger than you think you have." He looked at the finger and said, "We will have to go back to Mr. Marthinson's house to find a part of your finger." Mr. Smith told me we should go back to Mr. Marthinson's residence and see if we could find a part of the finger.

MR. CLARKE: May that be stricken as hearsay?

THE COURT: Don't give any conversation between yourself and someone who isn't present. Proceed.

THE WITNESS: We went back to 2506 Upton Street, N. W.

THE COURT: Who went back?

THE WITNESS: Myself and Mr. Smith.

By MR. COLLINS:

Q. Did you drive or Mr. Smith drive? A. Mr. Smith drove.

Q. You were not in a post office vehicle? A. No, we weren't. We parked in front of Mr. Marthinson's house at 2506. I stood on the sidewalk. Mr. Smith went down and eventually walked to the door, and Mr. Marthinson came to the door, and Mr. Smith asked him.

17 MR. CLARKE: I object to anything Mr. Smith said.

THE COURT: There is an objection. The Court will make the general observation. As counsel well knows, the testimony between the witness and

anyone out of the presence and hearing of the defendant is hearsay, and it isn't admissible. Kindly avoid that, and allow the testimony to go in, in accordance with the rules of evidence. Proceed.

By MR. COLLINS:

Q. What did Mr. Smith do when he went to 2506 Upton Street, N. W. with you? A. Knocked on the front door.

Q. Did someone come out? A. Mr. Marthinson.

Q. Did Mr. Marthinson indicate in anyway? A. Mr. Marthinson?

MR. CLARKE: That doesn't make sense.

By MR. COLLINS:

Q. I will finish it. Did Mr. Marthinson indicate in anyway whether the finger was or was not the portion of finger that was cut off, was or wasn't in the area? A. Mr. Marthinson said—

Q. Not what he said. Did he indicate or show in anyway?

THE COURT: Do you understand the question?

THE WITNESS: No, sir.

18 By MR. COLLINS:

Q. Did he gesture as to where the finger was? A. He dropped the finger in the front yard.

Q. Did he point to a place in the front yard where the finger was?

A. Yes.

Q. Did you and Mr. Smith go to find the finger? A. We searched.

Q. Did you find the finger? A. I don't know whether he or I found the finger.

Q. You or Mr. Smith? Was the finger wrapped in a piece of cellophane or right on the ground? A. The finger was right on the ground.

Q. What was the condition of the ground at that particular time of the year? A. The ground? The snow had been cleared away. It was muddy and wet.

Q. But in other spots there was snow? A. In other spots, yes, there was.

Q. What did you and Mr. Smith do after you found the tip of your finger? A. Well, after we found the tip of the finger, I got back in Mr. Smith's car and Mr. Smith was to run me to the hospital, the Washington Hospital Center.

19 Q. Did Mr. Smith give you or hold the piece of finger, or who had the piece of finger? A. I had the piece of finger.

Q. Was it wrapped in anything or open? A. It was open.

Q. Where did you then go when you left 2506 Upton Street, N. W.?

A. Went to the Washington Hospital Center.

* * * * *

29 THE CLERK: Plaintiff's Exhibits Nos. 1, 2 and 3 for identification.

THE COURT: It may be so marked.

(The photographs were marked Plaintiff's Exhibits Nos. 1, 2 and 3 for identification.)

By MR. COLLINS:

Q. Mr. Lofty, I show you three photographs. They are marked Plaintiff's Exhibits Nos. 1, 2, and 3 for identification, in that order. Can you tell me what Plaintiff's Exhibit No. 1 is? A. Plaintiff's Exhibit No. 1 is the inside of Mr. Marthinson's door.

THE COURT: What is that? When the witness and the attorney get so close together, you drop your voice to a conversational tone. You keep your voice up in speaking to the jury.

THE WITNESS: That is the inside of the door slot at 2506 Upton Street, N. W.

By MR. COLLINS:

Q. And I show you a photograph marked Plaintiff's Exhibit No. 2 for identification and ask you what that is. A. No. 2 is the outside of the door at 2506 Upton Street with the name plate and the letter slot.

Q. And Plaintiff's Exhibit No. 3 for identification, Mr. Lofty? A. No. 30 3 is the front door, complete front door at 2506 Upton Street.

Q. As you face it from the street or outside? A. As you face it from the sidewalk outside.

MR. COLLINS: I ask these be received in evidence as Plaintiff's Exhibit Nos. 1, 2 and 3.

MR. CLARKE: No objection.

THE COURT: Plaintiff's Exhibits Nos. 1, 2 and 3, the photographs in question, are received in evidence.

(The photographs, marked Plaintiff's Exhibits Nos. 1, 2 and 3 for identification, are received in evidence.)

By MR. COLLINS:

Q. Now, Mr. Lofty, did you have occasion, in fact, to go to 2506 Upton Street, N. W. and examine this door in detail? A. Yes, sir, I did.

Q. Did you make certain measurements of that door? A. Yes, sir, I did.

Q. I wonder if you would go to the board and draw the measurements of the door you have made. You might like to take this.

MR. CLARKE: Let the record show when he went to make the measurements.

31 By MR. COLLINS:

Q. When did you go to that location and make those measurements?

A. Last Thursday, January 20, 1969.

Q. I believe it is February. A. February 20, 1969.

Q. I think that will be enough, Mr. Lofty. Let us talk about the outside of the door, Mr. Lofty. How long is the slot? A. The slot is seven inches.

Q. This is from the outside of the door, correct? A. Yes, sir.

Q. How high is it? A. The slot is approximately two inches high.

Q. And what is the distance from the inside of the door to the outside metal plate? A. The inside of the door and the outside of the door is a metal plate of two and three-fourths inches, from the plate here to the inside of the door.

Q. What is the height of the center of the slot to the bottom of the stoop? A. The height is 31 inches from the stoop outside to the center point outside.

- Q. What is the number of inches from the door to the end of the stoop?
- 32 A. The door to the end of the stoop is approximately 17 inches and the stoop was five inches high.
- Q. What is the width of the door? A. The width of the door is approximately 2½ inches.
- Q. The width. A. You mean how deep is the door, the thickness?
- Q. No, the width right across. A. Oh, you mean this way?
- Q. Yes, sir. What is the length of the door? A. 82 inches.
- Q. Have you been on the inside of that door, Mr. Lofty? A. Yes, I have.
- Q. What is the depth of the slot, front and back from the inside? A. The depth of the slot from the front to the back is 2 and three-fourths inches thick.
- Q. What is the width? A. Approximately 22 inches.
- Q. What is the metal flap? A. The metal flap is approximately one-eighth of an inch thick.
- Q. What is the coil spring? A. There is a coil spring that sets in the drop about one inch there.
- 33 Q. Are you speaking of the center on the outside or inside? A. On the outside.
- Q. Do you know approximately the size of the coil spring? A. Approximately one inch.
- Q. What is the slot inside the door? A. Two inches.
- Q. What is the length of the slot inside the door? A. Approximately seven or eight inches.
- Q. When you were there on the inside of the door, what was the distance from the inside of the slot to the center of the door? A. 7 and 1/8th inches.
- Q. You made these measurements? A. Yes, I did.
- Q. Would you come back to the witness stand, sir? Now, Mr. Lofty, taking Plaintiff's Exhibit No. 1, which is the slot from the inside of the door, could you take this red pencil and mark where the spring is? May I pass these exhibits among the jury?

THE COURT: Does counsel wish to examine them? Any objection?

MR. CLARKE: No objection. I had the pictures taken.

MR. COLLINS: Yes, I appreciate the courtesy.

34 THE COURT: All right, they may be shown to the jury.

* * * * *

39 CROSS EXAMINATION

By MR. CLARKE:

Q. Mr. Lofty, how long had you been a substitute carrier before this incident as the Marthinson home? A. Approximately a year and five months.

Q. For a year and five months, you had been delivering mail to houses?

A. Yes, sir.

Q. In that general area? A. In Zone 8.

40 Q. And in that year or so you had been doing so, you had been delivering mail to doors that had mail slots in them? A. Yes, I had.

Q. You had been delivering mail to doors that had slots that you pushed in like this one? A. Yes, I had.

Q. This wasn't the first time you had delivered mail to a home that had a door that pushed inward, right? A. That is right.

Q. Up to the time of this accident, how many doors had you delivered mail to that had slots that pushed inward? A. I wouldn't have any idea how many.

Q. Would there be ten of them or hundreds of them, or what?

A. There could have been hundreds of them.

Q. Was there anything unusual about the Marthinson door as compared with the other doors where you had delivered mail, and the slots went inside?

A. One thing I noticed was that Marthinson's had "Papers" on it. I never saw a mail slot that had papers written on it.

Q. Papers was the only difference? A. Yes.

41 Q. If you took the word, "Papers," out of it, it looked the same as others? A. The same as others.

Q. Had you ever delivered mail to the Marthinson home? A. Yes, I have.

Q. How many times did you deliver mail to the Marthinson home before this incident? A. Approximately five or six times.

Q. That five or six times would have been within the time area of when you hurt your finger? Would it have been within a week or a month?

A. Oh, six or seven months.

Q. Over a six or seven-month period you delivered mail to this same house? A. Yes, sir.

Q. On those other occasions when you delivered mail to this house, would you put the mail into the slot? A. Yes, sir.

Q. On those other occasions when you put mail into the slot, did anything unusual happen to you? A. You mean the times before?

Q. Yes. A. No.

Q. Had you ever complained to the Post Office Department about the slot in the Marthinson door? A. No, I hadn't.

42 Q. To your knowledge, there was not anybody who had complained about the slot in the Marthinson door before you were injured? A. I don't know of anyone.

Q. The door looks pretty much the same now as it did when we had these pictures taken back in 1965, and it looked about the same way at the time of your accident, yes, or no? A. Yes, it did.

Q. This picture showing the inside of the door, you didn't see the inside of the door on the day of the injury. Did you? A. No, I didn't.

Q. On the inside of the door, will you take that red pencil and draw an arrow to show what side of the door is the top? A. You want me to show which side of the door is the top?

Q. Yes. Which is the top portion of the door? You can label it or draw an arrow. Now, you drew a "T", and what is that one? A. That is, I started to label it "O", then put a "T" for the top.

Q. So the "T" is the top, so when you look at the door, you look at the letter, "T".

THE COURT: What is the number?

43 MR. CLARKE: No. 1. And this "O", you say you made a mistake?

THE WITNESS: Yes, sir. I started to label it.

By MR. CLARKE:

Q. "T" is the top. Looking at it from the inside of the door, you have these red marks on the inside, and that is the spring? A. Yes.

Q. I wonder if you could demonstrate how that works. A. How the spring works?

Q. Yes. A. Well, the spring is a coil spring with the tension side down on the flap. Mrs. Marthinson told me on the day I examined it that the spring had broken a couple of days before, the tension on the flap, so when the flap opens up, the spring, the tension on the coil spring closes the box up.

Q. So when you push the mail slot in, it goes back up? A. Yes.

Q. And that spring, like my finger, forces it back down? A. Yes.

Q. Gravity would also make that slot fall down? A. Yes, I thought it would.

Q. Do you know what kind of a spring was on that door when you were hurt? A. No, I don't.

44 Q. And you did know, did you not, from having delivered this mail to this house on other occasions that there was a spring in that slot that would force it back? A. Did I notice there was a spring in it?

Q. Yes. A. You could feel there was a spring in it.

Q. Did you know that there was a spring on the Marthinson door?

A. It felt like a spring.

Q. You know that on other occasions when you delivered mail there?

A. Right.

Q. So when you came up to their house on the 20th of February 1964, to put the mail through this slot, you knew there was tension on that slot from the spring attached to it. Didn't you? A. Yes.

Q. I think you said on that day you were delivering a magazine with some mail. A. Correct.

Q. You would push this in the slot. Is that right? A. Yes.

Q. Would you push the magazine in first, or the mail, or both at the same time? A. You would fold the magazine in half and slide it in?

45 Q. What kind of a magazine was it? A. I don't know.

Q. So you would fold the letters inside the magazine and push it in the slot? A. Not inside the magazine, inside the folded magazine.

Q. You would put it in the magazine, fold the magazine and put it in the door slot. Is that right? A. Yes.

Q. And the weight of the magazine would make it fall through the door. Wouldn't it? A. Most of the time, yes.

Q. Did it on this occasion? A. Did it fall?

Q. Yes. A. Well, I checked it to make sure everything had fallen. I wouldn't think of a subject like this, but I was told by my supervisor from time to time that all mail goes completely through the mail slot.

Q. When you say you checked it on this occasion, how did you check it? A. With my hand.

Q. You put your finger in the door slot. Didn't you? A. Definitely, I think.

46 Q. At the time you put your finger in the door slot and pushed that slot back, Colonel Marthinson or Mrs. Marthinson weren't there. Were they?

A. So far as I could see.

Q. You were the only one that had control of that door slot. Weren't you? A. So far as I know, I was on the outside of that door.

Q. You don't allege that anyone on the inside of the door had control of that door slot. Do you? A. No, I don't.

Q. You put the mail in and then put your hand in to make sure it had fallen? A. The mail and the hand went in all at the same time.

Q. Did you have anything in your other hand? I assume that would be your left hand. A. No.

Q. You weren't carrying a pack? A. Such routes don't carry a pack.

Q. You take from your truck what you are going to take to the house? A. Yes.

Q. Your left hand was free? Did you take your left hand to hold it open to put this stuff in? A. No, I didn't.

47 Q. You just pushed the mail in and pulled it out? A. I put the mail in and then checked it.

Q. Did you put the mail in and leave your hand in a little while to check that it was all in? A. I ran my hand in across the slot to make sure no letter was standing up on the end of it.

Q. You put the mail in and you ran your hand along this slot? A. Right.

Q. And is that when the top fell down? A. The top was stuck. The flap was stuck.

Q. What was keeping it stuck? A. You have got me. I don't know what was keeping it stuck. It was stuck.

Q. The magazine wasn't keeping it open? A. The magazine wasn't on the side I had my hand.

Q. And there wasn't anybody inside that was keeping it open? A. Not that I know of.

Q. And the law of gravity would make it fall down because it was hinged on the top? A. Right.

Q. And the spring would force it down? A. Right.

48 Q. And you held it open with your hand in the slot. You held this swinging thing open with your hand in the slot? A. No, my hand wasn't holding the flap up.

Q. Do you know what caused it to stay open? A. No, I don't.

Q. Do you know of anybody who had ever used that mail slot before, who had said it stayed open? A. No, I don't.

Q. Had it ever stayed open with you before? A. No.

Q. After you put your hand in and you felt in to make sure the mail fell in, you pulled your hand out? A. Yes.

Q. Did you get your hand between that top flap and the bottom of the mail slot? Did you get your finger out? A. Yes.

Q. And you pulled your finger out and you pulled your finger off?

A. No, when the slot fell down, I took the tip of the finger off.

Q. How much of your finger is off? A. Approximately a half inch.

Q. Approximately a half inch of the top of the finger of the right hand.

Is that right? A. Yes, sir.

Q. And were the other fingers on the right hand, the fingers next to it involved at all? A. No.

49 Q. Just the half inch off that finger? A. Yes.

Q. You say you did not pull your hand out? A. I said when the slot slammed on my finger, the slot surprised me.

Q. When the slot came down, then you pulled it out? A. Yes.

Q. And you have indicated that this thing that has papers written on it, on this mail slot, cut your finger. Is that right? A. Yes.

Q. That thing that has papers written on it, when that things came down, it cut your finger? A. When that came down, I pulled my hand out.

Q. When that thing came down, and you pulled your finger out, did you pull the end of your finger off? A. Did I pull the end of my finger off? It surprised me. It had to hit my hand.

Q. In other words, I want to make one thing clear, Mr. Lofty, and I don't mean to be too repetitive, but when this lever came down, you say it surprised you? A. Yes, it did.

Q. Did it surprise you because it had a spring in it that forced it down?

50 A. No, it surprised me because I thought it was stuck. I thought I could pull my finger out anywhere.

Q. What do you mean you thought it was stuck? A. I thought it was stuck. When I pulled my hand out it released it.

Q. Actually it wasn't stuck? A. No, not when I had my finger in it.

Q. When you pulled your hand out, that was after this lever had come down on it, right? A. Yes.

Q. On that occasion, if you had pushed your hand back in the house or the mail slot, it would have opened up again. Wouldn't it? A. Yes, sir.

Q. But you pulled your hand out, didn't you? A. Yes, sir.

Q. When you pulled your hand out, your right hand was against the metal mail slot on the outside? A. Yes, it was.

Q. And against the metal swinging door on the inside? A. Yes.

Q. And as you pulled your hand out, you were pulled closer or tighter?
A. Yes.

Q. And isn't that what pulled the half inch off your finger? A. I had
51 the trouble with the flap. One of the two of it got it.

Q. Both of them could have got it, the combination of the two? A.
Yes, sir, and the element of surprise.

Q. And you say that you mentioned previously it cut your finger. Can
you distinguish whether this was cut off or whether it was pulled off, or do
you know? A. No.

Q. You don't know which it was? A. No.

Q. Now, up until last Thursday when you went out to Mrs. Marthinson,
to look at this place, had you been back to this place since then? A. No,
I hadn't.

Q. When you made those measurements which are on the board there,
and you testified to, that was the same door that was there on the day you
were injured? On this particular day that you were substitute carrier for this
particular route, were you in any hurry or were you running according to
schedule? A. I was running according to schedule.

Q. And even if you are late, you aren't reprimanded? A. What do
you mean? If I am late, I am not reprimanded?

Q. No. A. Anything could happen. They tell me the mail is never
52 late. People expect it early, but there are things. They expect it early, but
things happen. The truck breaks down. The mail is always on time. It is
never late.

Q. You weren't running on any schedule that day. Were you? A.
What do you mean, on any schedule?

Q. Were you supposed to be at any place on a certain time that day?
A. No.

Q. After you finished your route, you went back to the post office?

A. Yes.

Q. They didn't say you have got to finish it at a certain time? A. No.

Q. You delivered the mail for the year and a half or so that you delivered it as a substitute carrier before your accident. You say you would have hundreds of these slots you delivered to where they pushed inside. Is that right?

A. Yes.

* * * * *

53 By MR. CLARKE:

Q. The post office department has never instructed you not to deliver mail to houses with door slots. Have they? A. No, they haven't.

Q. Have they issued any type of instructions with reference to houses with door slots? A. If the houses do not have door slots or receptacles, you are supposed to bring the mail back to the post office and report it to the supervisor.

Q. In other words, you don't deliver the mail? A. Right.

Q. Do you have any type of instruction from the post office department as to what you should do if you consider the mail receptacle dangerous?

A. Yes.

54 Q. What? A. Report it to your immediate supervisor.

Q. You are supposed to report it to your immediate supervisor, and you have never reported the Marthinson house to your immediate supervisor. Had you? A. No.

Q. And you don't know of any you had reported it to your supervisor?

A. No, I don't.

Q. Of all of these hundreds of houses that have mail slots that go inside, you never reported them to your immediate supervisor. Had you? A. No, I hadn't.

* * * * *

55 By MR. CLARKE:

You said in the year and a half you were substitute carrier that you had delivered to other houses that had door slots similar to the Marthinson house, right?

THE WITNESS: Right.

By MR. CLARKE:

Q. And you have indicated that there might have been hundreds of them?

A. Possibly, yes.

Q. I ask you now, isn't it a fact that you find them in common usage around the Cleveland Park area?

* * * * *

56 A. Did I find them in common usage?

Q. Yes. A. Houses have them, yes.

Q. Do you know how far you had your hand inside that door? A. No, I don't.

Q. Could it have been as much as three inches? A. I don't know how far I had my hand in the door.

Q. You recall, don't you, Mr. Lofty, that I took your deposition on August 30, 1965? A. Yes.

Q. And I assume that things were a lot fresher in your memory then than they are now. On Pages 14 to 15 of that deposition, I asked you that question. "How far did you have your hand in this door receptacle?"

"ANSWER: How far?

"QUESTION: Yes. "ANSWER: I would say it was three inches in the door." Is that about right? A. Approximately, I guess it was.

Q. That does refresh your recollection that your hand was three inches in the door? A. That is approximately. I am going to say approximately.

Q. Yes. When you felt this flap against your finger, that is when you pulled your hand out of the door?

* * * * *

By MR. CLARKE:

Q. Who came to the door after this happened? A. Mr. Marthinson.

Q. Mr. Marthinson? A. Mr. Marthinson.

Q. Sure it wasn't Mrs. Marthinson? A. I am positive it wasn't Mrs. Marthinson.

* * * * *

58 By MR. CLARKE:

Q. When you realized that the tip of your finger or that one-half inch was missing, then you and Mr. Smith went back to the Marthinson home?

A. Right.

Q. And Mr. Smith knocked at the door? A. Yes.

Q. Where were you then? A. I was beginning to walk down the steps of Mr. Marthinson's house.

Q. You had got out of Mr. Smith's car? A. Yes.

Q. Who appeared at the door on that occasion? A. Mr. Marthinson.

Q. You are sure of that? A. Yes.

* * * * *

59 By MR. CLARKE:

Q. Am I correct that all of your expenses have been paid for by the United States Government? A. Yes.

Q. Am I also correct that when you were off your employment from the post office department that the government paid you compensation? A. Yes.

* * * * *

By MR. CLARKE:

Q. When you were up there the other day, you didn't see any other receptacle except the one that was shown in the picture? A. Right.

60 Q. So the assumption must be they are still delivering mail through that door slot? A. So far as I know, yes.

Q. When the doctor sewed the tip of your finger back on, didn't he lead you to believe that it might not stay on? A. Yes, he did.

Q. He indicated that it was a gamble you would have to take. Isn't that right? A. Right.

* * * * *

72

Washington, D. C.

Tuesday, February 25, 1969

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73

JEROME W. LOFTY,

plaintiff, resumed, and testified further as follows:

REDIRECT EXAMINATION

By MR. COLLINS:

Q. Mr. Lofty, when you were cross examined yesterday by Mr. Clarke, counsel for the defendant, I think you testified that you had seen several hundred mail slots which opened inward. A. Correct.

Q. Were or were not these mail slots similar to the mail slots at 2506 Upton Street, N. W., the Marthinson house? A. They were not similar.

Q. How did they differ? How did the slot at 2506 Upton Street, N. W. differ from these others, open inward mail slots? A. The slot at 2506 Upton Street, N. W., it has papers written on the flap. When most all other slots I service or sent mail through have nothing or U. S. Mail written on it. It would have a tiny flap, where the flap at 2506 Upton Street, N. W. was a one-eighth inch thick metal flap.

74 Q. What is the shape of the flap? A. Rectangular, not rectangular but oblong, semi-circular at the end.

Q. What was the bottom of the flap like? A. On the bottom edge, it was rough.

Q. And was the inside of the flap made of wood, not of the flap but of the slot, made of wood or metal? A. The inside of the slot?

Q. Yes A. The inside of the slot actually it had an outside cover, but it went into the door. It was all metal.

Q. The part where it went in, was that metal or wood? A. Metal.

Q. I think you testified that when you put your hand in, this flap stuck upward. A. Yes, it did.

Q. The part on which it stuck, was that wood or metal? A. Metal, the whole slot was metal.

Q. Mr. Lofty, I am asking you to look at Plaintiff's Exhibit No. 1, and you are looking at the slot now from inside the house. Are you not? When this flap goes up, what is that material up above where it hits? Is it wood or metal? A. The material up above where it hits is the door, a wooden door.

Q. It is a wooden door? A. Right.

75 Q. Was that where the flap stuck when you put your hand in? A. The flap stuck in an open position. As I put the mail in, it stuck in an open position where it was hinged at the top of the door.

Q. That would be against wood or metal? A. Against the wood hole in the door.

Q. Is it possible that this flap stuck on some wood or splinter of wood? A. It is possible.

MR. CLARKE: I object to that because he is speculating.

THE COURT: That is speculative. It doesn't call for a fact. It calls for speculation. I think I will have to sustain that and instruct the jury to disregard that as part of the evidence in this case. Proceed.

By MR. COLLINS:

Q. Had you received instructions or not received instructions from personnel at the post office department to make sure the mail cleared the slot?

A. Yes, I had.

MR. CLARKE: Objection. It goes beyond the direct.

MR. COLLINS: I think that question was allowed on cross examination.

THE COURT: I will let it go in at this time.

76 THE WITNESS: Yes, I had been.

By MR. COLLINS:

Q. Did you receive any such instruction from Mr. Manoff? A. Yes, I had.

Q. Yesterday, Mr. Clarke inquired whether it wasn't impossible when you had had your one hand in the slot to get the mail through, to put your other hand in? Could you have put both hands in the slot? A. It isn't big enough.

Q. That isn't my question. Could you have put both hands in this particular slot? A. No.

Q. Why not? A. Not at one time because my hand is too big.

Q. You have testified many times that when you put your hand in and put the mail through and cleared the mail that when you had put your hand in the flap stuck upward. Am I correct in my recitation of your testimony?

A. Correct.

Q. Mr. Clarke asked you yesterday whether or not gravity could have pulled that flap down on you. Do you feel that gravity pulled the flap down?

MR. CLARKE: Objection. That calls for a conclusion. It is speculative.

77 THE COURT: I think that the question was asked on cross examination. In respect to gravity, I will allow it to go in.

THE WITNESS: Well, the flap was stuck so evidently gravity couldn't pull it down.

By MR. COLLINS:

Q. What did cause the flap to come down? A. Whatever was holding it, released the flap on the front door.

Q. When you pulled your hand out, why did you happen to pull it out? A. Because the flap slammed down on it. Just take a hammer and hit down on the hand. The flap just slammed down on the finger.

Q. Were you then or were you not trying to get your hand out as a feeler, as a reflex action? A. Correct.

* * * * *

89

RECROSS EXAMINATION

By MR. CLARKE:

Q. Mr. Lofty, when I showed you Plaintiff's Exhibits Nos. 1, 2 and 3 yesterday and asked you if this was the same type of mail box that you had delivered mail to in other homes. You said it was the same type. Is that right? A. Similar.

Q. You said the only difference was on the Marthinson mail slot they had the word, "Papers". A. Correct.

Q. Other than that, you have seen mail slots like this before. A. Similar to them.

Q. And you have delivered mail to them on other occasions, hundreds. Is that right, yes or no? A. Yes.

* * * * *

91

By MR. CLARKE:

Q. After the magazine with the mail was folded in it, you put your finger in it to find out whether the mail went on the floor? A. The mail was there.

Q. When this flap came down on your finger, you pulled your finger away? A. I pulled my hand.

Q. And no one else was near that flap, other than you? A. I couldn't see through the door. No, I couldn't tell you that.

* * * * *

117

EVERETT SMITH

was called as a witness on behalf of the plaintiff, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. COLLINS:

Q. Would you state your full name, please? A. Everett Smith.

Q. Where are you employed, Mr. Smith? A. City post office.

Q. Where do you reside, sir? 242 Main Street, N. E.

118 Q. How long have you been employed by the post office department or the postal service? A. Thirteen years.

Q. Were you employed in the postal service on February 20, 1964?

A. Yes, I was.

Q. Where were you employed on that date, sir? A. I was a letter carrier up at the Cleveland Park Station.

Q. Where is the Cleveland Park Station located? A. Connecticut and Ordway Streets, N. W.

Q. Was the plaintiff in this case, Jerome Lofty, also employed at that station at that time? A. Yes, he was.

Q. Did you know him? A. Yes, I did.

Q. How long at that time had you known Mr. Lofty? A. For about a year or two.

Q. Did you know him in a job capacity, professional capacity or social capacity? A. Job capacity.

Q. Did you see Mr. Lofty at all on Thursday, February 20, 1964?

A. Yes, I did.

119 Q. Where did you see Mr. Lofty, sir? A. I saw him at the Cleveland Park Station.

Q. Could you tell us the circumstances about when you saw Mr. Lofty at the Cleveland Park Station on February 20, 1964? A. When, it was around 1:15 or 1:30, and I had just completed my route and I was checking in, my returns and my receipts and also my keys.

Q. What do you mean, checking in, sir, if you will be so kind?

A. After you finish your route, you have to turn in your receipts for your registered mail and also hand in your keys for the mail box.

Q. Where are these mail boxes, streets or apartment houses? A. Streets or apartment houses. As I turned around, I saw Mr. Lofty and he had an anguished look on his face.

Q. What door was he coming in? A. In the door to the workmen.

Q. Where does that door lead from? A. From a lobby.

Q. Is this a lobby that is reserved for postal employees or do the regular patrons of that post office branch or station use that lobby? A. Post Office patrons.

120 Q. What did Mr. Lofty do when he had this look of anguish on his face? A. He then approached Mr. Manoff, who was the superintendent of the Cleveland Park Station, and he was talking to him and I went over to him and he showed Mr. Manoff and I his finger, and he said he hurt it while delivering mail.

Q. Did he tell you exactly where this happened? A. Yes, he did.

Q. And where was that? A. He said it was 2506 Upton Street, N. W.

Q. What did you do after you obtained this information from Mr. Lofty?

A. Then Mr. Manoff asked me would I take him to the hospital.

Q. Did you proceed to take him to the hospital, sir? A. Yes, I did.

Q. What transpired next in the events leading to your taking him to the hospital? A. When I went out the door, I told him that I read in the hospital about grafting pieces of finger back to the finger. I asked if he would like to go back and look for it.

Q. Were you going to take him in a car owned by the post office department, or take him in your private car? A. In my private car. He said, "That is a good idea," so we proceeded up Upton Street.

121 Q. Did you have to go up and get your car? A. Yes, I was parked at Ordway Street.

Q. How far is Ordway Street from this post office? A. Probably thirty or forty feet.

Q. Did you pick up Mr. Lofty, or did he go with you? A. He went with me.

Q. Where did you proceed to? A. 2506 Upton Street.

Q. What transpired when you approached 2506 Upton Street?

MR. CLARKE: May we approach the Bench?

THE COURT: You may. (AT THE BENCH)

MR. CLARKE: I believe we have taken this man's deposition.

THE COURT: Yes.

MR. CLARKE: So we know what he is going to say, so that is why we are approaching the Bench before he says it. He is going to say he had a conversation with Mr. Marthinson, and Mr. Marthinson will say he had tossed the piece of the finger out on the snow.

THE COURT: He tossed the defendant out on the snow?

MR. CLARKE: A little piece of finger. Mr. Marthinson is dead. That would be a statement made by a deceased person, and I would object to it, Your Honor.

THE COURT: And there is no possibility of cross examination?

122 MR. CLARKE: No, sir.

MR. LESTER: Our contention is it would be in the nature of admission and exception.

THE COURT: I don't see what it has to do with the case anyway.

MR. LESTER: My point is once they touched the finger, they have to use due care, rather than tossing it out in the snow.

THE COURT: Is there any connection between the treating of the finger and throwing it into the snow?

MR. LESTER: Just the pain and suffering of the man going through the trial of having to hunt for his finger and having to suffer pain and suffering and having to hunt for his finger.

MR. CLARKE: If it were admitted, it would be highly prejudicial, and I don't have Mr. Marthinson here as a witness to counteract it.

THE COURT: I don't see the relevancy of it in the first place, so far as the issues in this case are concerned. The showing of indifference has no bearing on the case. The attitude of this man toward the finger would have no bearing on the case, except for a prejudicial case.

MR. LESTER: We approached the Bench before the asking of the question. The punitive damages of throwing the finger into the snow, in the opening state-
123 ment that wasn't incorporated because of the prejudicial affect.

THE COURT: You have some claim of negligence, and that was a ground for punitive damages. How does the negligence apply?

MR. LESTER: By tossing the finger into the yard. I submit to Your Honor that it was negligence that he picked up the finger and tossed the finger and caused extreme mental anguish to the plaintiff and pain and suffering.

THE COURT: I am not persuaded that it is part of the case. I will sustain the objection.

(IN OPEN COURT)

By MR. COLLINS:

Q. When you went to the Marthinson home, Mr. Smith, who came to the door? A. A gentleman came to the door.

Q. Are you sure about that? Was it a gentleman and not a lady?

A. It was a gentleman.

Q. And after conversation with the gentleman, did you find the piece of finger that had been cut off by the slot belonging to Mr. Marthinson?

A. Yes, we found the finger.

Q. Where did you find it, sir? A. Found it in the yard.

124 Q. Now, sir, exactly where out in the yard did you find it? A. Well, we saw it. It was on the left-hand side as you were looking out toward the street, of the yard. It would be on my right.

Q. On the Marthinson property, is that the larger of the two sides of the yard in front of the house, or the smaller? A. I can't recall that.

Q. But it would be to the left rather than to the right? A. Yes, to the left.

Q. How far from the house would you say it was? A. I would say three to five feet.

Q. When you first saw Mr. Lofty in the Cleveland Park Branch Post Office, Mr. Smith, was his finger bleeding? A. Yes, it was.

Q. I think you indicated. I think you said he had an anguished look on his face. A. Yes, he did.

Q. When you drove him from the branch post office or the Cleveland Park Station to the Lofty house at 2506 Upton Street, N. W. was or was not his finger bleeding at that time? A. At the Lofty house?

Q. I am sorry, the Marthinson house. A. Yes, it was bleeding.

125 Q. Did he seem to be in pain? A. Yes, he was.

Q. After you obtained the piece of the finger from the front yard of the Marthinson house at 2506 Upton Street, N. W. did you then proceed to a hospital? A. Yes, I did.

Q. What hospital was that? A. We went to the Washington Hospital Center.

Q. At that time were you driving the car? A. I was driving.

Q. You were driving? You drove both times, I take it. A. Both times.

Q. Did Mr. Lofty or did you have the cut-off piece of finger? A. Mr. Lofty had it.

Q. Was Mr. Lofty in any apparent pain at that time? A. Yes, he was.

* * * *

By MR. COLLINS:

126 Q. Could you describe to me, sir, the appearance of the gentleman who came to the door of the Marthinson household? Did you knock on the door or ring the bell? A. I rang the bell.

Q. What did the gentleman look like who came out? Was he tall or short? A. He was a tall elderly gentleman.

Q. Was he stooped, used a cane, or stood straight? A. He was very straight, and stood very erect.

* * * *

CROSS EXAMINATION

By MR. CLARKE:

Q. Mr. Smith, had you ever delivered mail to the Marthinson house?

A. No, I had not.

127 Q. You are the one who suggested you go back and look for this piece of finger? A. That is correct.

Q. Isn't it a fact that you found the piece of finger on the street?

A. That is correct.

Q. It had snowed that day or shortly before that? A. That is correct.

Q. And the finger was in the snow? A. In the snow, on top of the snow.

* * * * *

128 MR. LESTER: We would also like to make a matter of record that the defendant in their pleadings have admitted that the day of the accident, Mr. and Mrs. Marthinson were joint tenants of the property and the home involved in this accident.

THE COURT: Any objection to that?

MR. CLARKE: None.

THE COURT: Ownership of the property, you are speaking of?

129 MR. LESTER: Yes, Your Honor

THE COURT: All right, it has been stipulated. What is your stipulation?

MR. LESTER: The defendants admitted the ownership of the premises on the date as alleged and the ownership as alleged was that the defendants owned the premises at 2506 Upton Street, N. W. in the District of Columbia, being Lot 3826 of the land records of the District of Columbia and improvements thereof, as tenants of the entirety with the right of tenancy, and Ruth Coleman Marthinson, being a surviving tenant. We would like to ask the Court to take judicial notice of 45 CFR Section 45.

THE COURT: Come to the Bench on this.

MR. LESTER: Yes, Your Honor.

(AT THE BENCH)

THE COURT: Any objections?

MR. CLARKE: Yes, sir.

THE COURT: Let us have the objection.

MR. CLARKE: First, I would like to see when that was published. I think this will show that it was published on December 6, 1961, Your Honor, which was twelve or thirteen years after this house was built, and there was no indication that regulation was retroactive, and we know that the building code regulations are not retroactive. That was decided in the case of Phillips
130 v. Capital Investment and Guaranty Company, 32 Atlantic 2d 249. A reading of the present proffer would indicate that there is nothing in there that says it would be retroactive. I submitted that in pre-trial.

MR. COLLINS: Would you like to have the Judge see a copy of it? I don't have any more copies. We gave one copy to counsel.

MR. CLARKE: I have one copy at the table.

MR. COLLINS: Section 45.4, Your Honor.

THE COURT: All right, well?

MR. CLARKE: I also stated that it is up to the Court to determine whether or not this regulation is applicable, at the sound discretion of the Court to make that determination.

THE COURT: What particular portion of this regulation are you relying on?

MR. COLLINS: Your Honor, this regulation indicates clearly that this flap on the mail door slot must be one on the top on the outside of the box, opening out. It does not provide or allow for a flap that is inward.

THE COURT: What number?

MR. LESTER: 45.4.

THE COURT: A clear regulation, door slot specification, is that it? I am afraid I don't know how to interpret that. It states, "A clear regulation: (b)
131 The door slot specifications be clear, rectangular on the outside. Slot must be at least 1½ inches wide and 7 inches long. No violation of that.

MR. LESTER: No.

THE COURT: The slot must have a flap hinged at the top edge, placed horizontally, and hinged at the top away from the hinged side of the door, placed vertically. The only portion that could possibly apply to is that this slot have a hinge at the top since it was placed horizontally.

MR. LESTER: The way we read it, it was hinged at the top of the door slot. It wasn't hinged at the top of the door. Your Honor, you read that, No. 1. It is hinged at the top of the door slot, not within the door slot, is this particular mail flap.

THE COURT: Where do you find that?

MR. LESTER: Hinged at the top.

THE COURT: It doesn't say which one.

MR. LESTER: Reading in conjunction with the diagram and specification, it seems clear that section provides for a door slot with a hinged flap moving outward.

MR. CLARKE: I wonder if the jury could be excluded.

THE COURT: I am not persuaded that this calls for that. At least I would like to have that information which provides for that. We have a drawing here, showing something protruding out at an angle from the main body somehow.

132

MR. LESTER: The hinged portion of that on the inside?

THE COURT: How does anyone know that?

MR. LESTER: It is on the outside of the hinged portion. No. 3, the drawing is clear that type of slot could only open up the flap.

THE COURT: What is the proximate cause of that so far as this accident is concerned?

MR. LESTER: Had they had a door flap that opened outward, it would be impossible for the man to have got caught.

THE COURT: What is the purpose of your objection. Is there any safety measure?

MR. LESTER: The enabling statute under which these are authorized, concerning the safety of postal carriers, will be considered in the regulations.

THE COURT: Where are you?

MR. LESTER: Statute 29(c) 6310. That is the regulation issued pursuant to those statutes.

THE COURT: That isn't anything I know anything about, what you are reading from.

MR. LESTER: I will get the statute.

MR. CLARKE: Could the jury go out:

THE COURT: Ladies and gentlemen of the jury, as the Court stated to you at the outset, time would arrive, might arrive, and it has arrived here where questions would come before the Court, with which the Court is concerned and
133 of which you are not concerned. The Court passes on questions of law and you, as jurors, are required to take the law from the Court. That is your burden. That is the law. Now, the Court has a matter before it for the Court's consideration, as a Judge, which it must resolve and pass upon.

In any conference that takes place of this type, no inference is to be drawn by the jury as to what transpires or no speculation or guess work should be indulged in. You will be instructed as to the law, and you are bound by the instructions that will be given to you at the conclusion of the case.

You will be fully considered. It will take some little time to discuss this matter by the Court and counsel. The Court isn't disposed to let you sit in the uncomfortable position that you are in. Please hold yourselves in readiness to return.

(THE JURY RETIRES)

THE COURT: It runs in the Court's mind what relevancy does a regulation setting forth the nature and character of a mail slot, mail receptacle at a residence have to do with the question arising in this case as to whether or not the plaintiff on this property was guilty of negligence of the maintenance, in the presence of the mail slot which you allege was involved in this accident.

134 In other words, was this regulation a safety regulation or a regulation for convenience, or what type of regulation?

MR. LESTER: We have an expert witness which we would propose to put on the stand. He will show in his opinion the safety regulation involved safety of the letter carrier.

THE COURT: What is the witness' name?

MR. LESTER: Mr. Lee L. Hulick.

MR. COLLINS: He is in the Operation Division of the Post Office Department, dealing with city delivery.

THE COURT: What do you propose to have him testify to?

MR. LESTER: That this regulation describes the mail slot.

THE COURT: That is obvious.

MR. LESTER: That only allows the flap to open outward.

THE COURT: You say that is demonstrated. Maybe you are right. That diagram does indicate that the regulation calls for a flap on the mail slot, on the building or residence, that the flap opens outward. Perhaps it does. Is that for the purpose of convenience of the general public or in what way is it connected with safety?

MR. LESTER: It is for the protection of the mail; that the mail, the specification of the slot, the height of the slot, the opening outward is all designed for the convenience and safety of the postman. That is our reading,
135 and that is what our expert, we hope, will testify to.

THE COURT: He is to testify to the legislative portion?

MR. LESTER: To the policy.

THE COURT: You think that is applicable to the property owner to have the property owner charged?

MR. LESTER: I do, because right at the outset the obligation of the patron—

THE COURT: What number are you speaking of?

MR. LESTER: 45.4(a).

THE COURT: Patrons must provide mail receptacles or door slots.

MR. LESTER: It is an obligation of the patron, we contend, to provide a door slot as of this date in conformance with this regulation, and we feel that had the mail slot not had a spring, and had it opened outward, this accident would not have happened. That is an inference the jury could draw.

THE COURT: What do you say about it?

MR. CLARKE: Your Honor, the house was built before that regulation was published, No. 1, and that regulation is not retroactive.

THE COURT: You say it wasn't retroactive?

MR. CLARKE: Yes, sir.

THE COURT: How do you know about that?

136 MR. CLARKE: We have a case in the District. They said the District Code isn't retroactive, and the building code is for the safety of the people. That regulation is for making people delivering mail, safe, and that is delivering it without its being stolen or mislaid.

In the reading of that regulation, you will see we met all the specifications as to measurement and the regulation only says the horizontal slot shall have a hinge at the top, but it doesn't say it must be hinged on the outside, and it doesn't say it, nor have a spring. It says it was hinged at the top. There was a hinge at the top. That drawing merely gives you some idea of what they are talking about, but it is certainly not the law. I can't imagine the law being contained in a drawing.

THE COURT: There has to be some pertinency to it. I can imagine a drawing as a part of an instrument in a patent.

MR. CLARKE: I don't see a postal regulation that sets it out.

THE COURT: When a hooded plate is used inside, the bottom line of the hooded portion has to be one and three-fourths inches broad.

MR. CLARKE: We don't have a hooded portion.

THE COURT: The rest of it after the words, "The slot must have a hinge at the top," is about the only part pertinent to this regulation.

137 MR. CLARKE: Yes, sir.

THE COURT: 45.4(b).

MR. CLARKE: So I say that regulation came after the house was built. There is nothing in that regulation to show that was supposed to be monetarily some home owner's. It is rather for reaching when you consider the post office says you can put a regulation out and make everybody change their door slots. It wouldn't be right.

As I say, it is the Court's duty to determine the applicability of that statute, and in determining the applicability of that statute, you must consider whether it is reasonable and whether the defendant's door slot, as drawn on the board, reasonably meets the standards as set forth. I don't think it is applicable in the first place, because the house was built before the regulation came out, and we must also consider the testimony that they delivered mail there from the time that regulation came out in 1961. In 1964, there has been nothing in the record here to show that the post office department or any of its employees gave any notice to the plaintiff that she had a door slot that did not meet specifications. Therefore, they couldn't deliver mail to her, and therefore, the testimony is the door slot is still there.

They went out there last Thursday, saw it, and the pictures are in evidence, and it looked the same last Thursday. We can infer from that, that that mail
 138 has been delivered through that door slot all that time.

THE COURT: All I can say is part 45.4 appears to be relevant to the instrumentality of the question in the broadest way. The first sentence, "The patrons to carry and delivery service, to carry mail and the use thereof," and it goes on to tell about the business houses that aren't applicable and building equipment and an elevator, which aren't applicable. It says, "Are not open," that the door slots must be open. It isn't in anyway pertinent to this situation as the Court views it. It is that patrons in the use of the service must provide a mail facility and the door slot specification provides the slot measurements of it. It must have a flap hinged at the top, based horizontally.

MR. LESTER: As you pointed out in the patent case and other contract cases, we see 45.4(b), specifications. Now the specifications clearly reveal, as a matter of fact, in drafting regulations as to the drawings, are part and parcel of it. In reading the word, "Specification", makes it clear a flap must be hinged at the door stop, but in this case, it wasn't.

THE COURT: I can see the pertinency of your statement that this specification, the specification is a term generally used for drawings for construction, particularly in patent cases, so I feel that the specifications set out here are part

139 of the Section 45.4 under the heading of, "Mail receptacles."

MR. LESTER: I would also like to call Your Honor's attention to the front view of the door slot plate, which indicates by the drawing which is to scale, two raises on top of the door slot flap, which indicates clearly by the drawing standards that the hinges are to be on the door slot plate, which of course would only appear to open outward because the drawing indicates only that the front flap opens outward, because it is longer than the slot. In other words, it is specifically designed so it can't swing inward.

MR. CLARKE: I don't see anything in that specification that says the flap can't open inward. It just says, "It must be kept at the top." I pointed out that the post office department delivered mail and still delivers mail through this slot. I am sure if it wasn't a proper receptacle, according to post office standards, it would stop delivering mail there and also the hundreds of houses Mr. Lofty said he delivered mail to.

MR. LESTER: I think the Court would take judicial notice of the fact that any regulations if it is in violation, are still in operation.

MR. CLARKE: The United States Post Office Department has an interest, brought out by the plaintiff's testimony. They certainly cannot sit down and do nothing, and on the other hand, come in and introduce a regulation that
140 isn't applicable.

MR. LESTER: I don't think it is relevant unless we, as a matter of defense, you may introduce as a matter of judicial interpretation there is a violation. First it is the Court's determination whether it was applicable and whether or not it was a violation and whether the violation—

MR. CLARKE: Also these drawings in here are not labelled as specifications as such and the illustrations are not labelled, "Specifications".

THE COURT: Well, have you completed your statements?

MR. LESTER: The points of emphasis again, it does not provide for any spring either in the words or drawings. I have emphasized that the drawings and the specifications only allow the flap to be outward. In addition, Mr. Clarke has made the point, the regulations do not appear on their face to be retroactive.

As I understand the building regulations in the District of Columbia are specifically so limited and in addition should the Court determine it was not binding as a violation of the law, under the case of *Curtis vs. District of Columbia*, 363 Fed 2d 975.

THE COURT: I recall this case. Have you seen this case?

MR. CLARKE: I haven't seen that.

141 THE COURT: That was a case against the city, the District, where a hinge projected over and above the level of the sidewalk causing a person using the sidewalk to come in contact with it and suffer injuries. That is on the retroactivity of it. It was a common law proposition and was admissible.

MR. CLARKE: This apparently went off on the common law doctrine rather than on the code.

THE COURT: It was combined as I read it. I don't recall the body of the case.

MR. CLARKE: I cited the case previously to you that the building code regulations are not retroactive, and of course I think in order for something to be retroactive, it would have to spell it out and have some penal provision, which this postal code does not have. It is a postal regulation rather than the code.

THE COURT: I don't know whether there is anything like that in this. Is there? I mentioned earlier that my perusal of this regulation we have been discussing did not appear to, didn't persuade me that it contained any provision based upon or as a result of the purpose of safety on the part of the public. In other words, the provision they have been presenting to me, Part 45, with its city delivery, such as 45.5 mail receptacles, do not have any appearance to the Court of being safety regulations. They are regulations with respect to the instrumentalities to be used, or the devices to be used in connection with the delivery of mail in receptacles which could be used for the receipt of mail to be delivered in the various types of structures.

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In this case of *Curtis vs. District of Columbia*, which is a provision with respect to the requirement that a protrusion or metal projection shall not exist which rises above the level of a sidewalk, and while the building code makes that provision, it is apparent from the reading of this decision, it is a safety provision. I think to get the whole thing in focus, the Court would read Section 3 or Division 3 of the case of *Curtis vs. District of Columbia*, 363 Fed. Reporter 2d Series, 973 at Page 974 and over into 975, and we have a comparable situation in *Edmunds, Inc.*, 118 U.S. App. 109, 322, Fed. 2d, 309, 311.

I am not satisfied as I have already indicated that this regulation is a safety regulation. This is a regulation having to do with the matter of the delivery of mail to the city in the District of Columbia, rather than a regulation having to do with the use of this material by the general public. So far as the protrusion of the sidewalk, I don't believe that this regulation, as I have read it, has anything to do with the requirement of safety so far as the general public is concerned. I do believe, with some degree of hesitancy, on the question of notice that it is a common law matter that if this instrumentality is maintained, that is, this mail box is maintained in a way so as to cause a person owning the property in this action in which the instrumentality

143 is maintained, to know or in the exercise of reasonable care to be given constructive notice, you might say, that the dangerous instrumentality was being encountered, then as a common-law proposition within the realm of the Court's understanding of reasonable, that the jury should be allowed to pass on the question of whether under all the circumstances the defendants were negligent in maintaining this delivery receptacle in the condition as constructed, as it was constructed and had been constructed for sometime, so as to impose upon the defendant a possible conclusion of negligence.

I feel that the regulation submitted here is not pertinent to the issues in this case, but that the maintenance of the instrumentality and receptacle could be used as a basis for a question of fact by a jury as to whether the instrumentality was as a matter of negligence, a common-law standard, and one

which puts on the owner the responsibility of, or the possibility that the jury might hold the owner responsible in that principle of common law in negligence. To offer the covering statement, I may be a little confused but the point the Court is trying to make is, I don't believe that the postal regulation captioned, "City delivery," and numbered 45.5 and subcaptioned, "Mail receptacles," is pertinent to the issues in this case and shouldn't be received and if this case is submitted to a jury, it is submitted on the question of whether or
144 not the defendant was negligent under the principles of common-law negligence.

MR. LESTER: May I make an offer of proof of what I expect to make? This will be an offer of proof on behalf of the plaintiff. I hereby make the proper offer of proof that if Lee L. Hulick were called, he would testify he was the Assistant Director of the Delivery Division, Bureau of Operations, Post Office Department, that he has held that position since mid-year of 1968. Prior to that time, he was Special Assistant to the Director of that division and that he held that position since approximately September of 1961.

He would further testify that his duties and responsibilities involved a division which had jurisdiction and responsibility for the distribution and delivery of the mail. He would further testify that based upon an experience in his prior appointment with the Post Office Department, that he would feel it was based on such experience, based on the experience of what the Post Office Department was and what it encompassed when a postal instruction or manual regulation was published or would be.

He would further testify in detail in regard to his background and experience, the basis for his ability to testify as to the purpose of the regulation and the policy involved in such regulation. Further, he would testify that he felt competent and on the basis of the detail in factual matters, to
145 interpret the policy and intent from an operation standpoint, that the drafting of the regulation Section 45.4 was and would have been within the jurisdiction of his division.

The witness further would examine Section 45.4 of the C.R.F. C-26Fr 11579, December 6, 1961, and present his interpretation of what the specifications including the drawing would require. He would specifically testify that it provides only for a mail flap, hinged at the top on the outside of the face of the mail slot plate, and that such mail slot plate would not contain a spring on the hinge and that such mail flap would be required by the regulation to open outward.

He would testify generally as to postal regulations and consider as a matter of policy of the safety of the mail and the safety of the carrier. He would testify as to his familiarity with postal procedures, which as a matter of course reflect policy of any kind of a receptacle may be satisfactory if it protects the mail and the carrier can deposit mail with ease and without injury.

He would testify further in regard to postal regulations concerning rural mail deliveries in his past experience, which would incorporate specific references that mail carriers in rural deliveries shouldn't be required to deliver mail to boxes where there was contagious diseases or quarantine.

146 He would further testify in regard to the specific regulations in question, mainly Section 45.4 of the Postal Regulations 26, Federal Rule 26, Postal Regulations 11579, December 6, 1961; that the regulations had as their purpose convenience and safety of the mailman as specifically evidenced by such factors as the height of the midline point of the mail slot opening by a trap 30 inches above the floor, as well as the fact that the mail slot would open only outward.

He would also testify that the regulations would have as their purpose the protection of the mail, the safety of the mail and the convenience of the postman.

I would further testify to his knowledge that the Post Office Department does not have any regulation in existence which would permit a mail slot with

an inside flap. I believe that is all. Thank you so much.

THE COURT: Want to object to that?

MR. CLARKE: No, I think he had the right to make a proffer.

THE COURT: The proffer is refused on the basis of the ruling indicated by the Court in discussion at the Bench just previous to the making of the offer.

I want to say to you, I am going to have to leave not later than four o'clock. Counsel, approach the Bench.

(AT THE BENCH)

147 THE COURT: In order to expedite this matter, I suggested in the line of my announcement here that I would welcome instructions in line with the views I expressed regarding the question of submission of the issues to the jury with respect to the claim of negligence on the part of the defendant.

MR. CLARKE: Thank you, Your Honor.

MR. COLLINS: Plaintiff rests.

MR. CLARKE: May we approach the Bench?

THE COURT: You may.

(AT THE BENCH)

MR. CLARKE: Your Honor, if the Jury were excused, we could talk more freely.

THE COURT: Had I known that, I wouldn't have called them back. I think you can speak quietly.

MR. CLARKE: I make a motion for a directed verdict in favor of the defendant, because: 1. There has been no duty shown to exist, and 2. There has been no breach of any duty. The plaintiff has failed to show anything more than the mere happening of an accident.

The plaintiff has not shown that the defendant was negligent in any manner. In fact, the plaintiff's testimony shows that the plaintiff, himself,

controlled the door slot that brought about the injury complained of and no one else had any control over it. The fact that he had reached his hand in
148 the door slot to feel, to make sure the mail fell down, in and of itself might be negligence on his part, or at least contributory negligence.

I, therefore, move for a directed verdict in favor of the defendant. In fact, I don't know what negligence they have proven that I would have to combat at this point in the case, sir.

THE COURT: I will allow counsel to reply.

MR. LESTER: No. 1, we feel we have established that the defendants were the owners of the premises. 2. As a matter of law, they had a duty to maintain the premises so that someone had the legal duty to the postman, and had a duty to deliver mail, to maintain the post slot in a reasonably safe condition. 3. It has been established that the post slot was of antique design. It had a heavy metal flap. Even on cross examination, counsel for the defendant established that it was an unusual post slot. The unusual nature of it consisted of its design. It had a heavy metal plate. It opened inward into wood. The defendant testified that the wood was rough and worn. 4. The defendants had a duty to maintain and inspect the post slot and maintain it in proper working order.

It is clear from the evidence that the defendant breached this duty by virtue of the fact that by using ordinary and reasonable care, the postman put his hand in the slot and the slot stuck in an upward position. The flap
149 it is clear, malfunctioned and the box malfunctioned. The slot malfunctioned and it suddenly snapped down upon his finger, so it is on the basis of this evidence that the jury can determine that the duty owed by the defendant was breached to the plaintiff, and that the plaintiff's injury was the proximate cause thereof.

As a second independent ground, it is clear that after the accident occurred, the defendant or defendants placed the finger or tossed the finger of

the plaintiff into the yard, which constituted a separate act of negligence, in that it caused him grave pain and suffering and humiliation thereby adding to his damages.

Of course, we, in addition reassert as a separate and independent ground the statutory requirements which have previously been offered to the Court, which I would like to make as our offer of proof.

MR. CLARKE: If I may refute those, there has been no testimony that we did not maintain a proper slot. There has been no testimony that we did not inspect it. There has been no testimony that a reasonable inspection would have found anything wrong with the door flap, either.

The testimony is that it was used before this accident and has been used almost five years or about five years since the accident. The element of putting his finger out in the yard, I do not think is negligence or gross negligence.

150 THE COURT: I think I ruled it out.

MR. CLARKE: If that has been ruled out, then I assume that the punitive damages have been ruled out.

THE COURT: I am speaking of putting the finger in the snow.

MR. CLARKE: They have asked for punitive damages.

THE COURT: I wasn't ruling on punitive damages.

MR. CLARKE: I want my motion to include that because there hasn't been any testimony of any wanton or malicious acts of the defendant.

THE COURT: The Court didn't intend to rule on the specific issue, as I said, but the Court is not persuaded that there is any issue in this case that would give rise to a claim, give rise to a proper assertion of a claim of punitive damages in this case.

The Court is going to permit this and is going to overrule your motion at this time. We all know what the situation is with respect to your motion.

As to the onus that the responsibility rests on the denouement and the evidence that all testimony pertinent to the issue and all inferences arising therefrom, are to be construed most strongly in favor of the respondent against the denouement, but without passing on the merits at this time, the Court will submit this matter and overrule your motion at this time.

151 I might call your attention to an excerpt to a recent opinion, January 25th of this year, *Morse vs. Moretti*, which is not controlling in all cases, but it is an expression of the view of the decision and worthy of some consideration. It cites the case of *Morse vs. Moretti*, January 25th, an appeal from the United States Court of Appeals for the District of Columbia, and states, "Where the Court has any doubt whether to grant a motion for a directed verdict, the better practice is to not grant the motion but rather to let the jury bring in a verdict and statement for the purpose of that procedure," which leads the Court at this time to overrule your motion.

MR. CLARKE: As I understand it, you have ruled out the punitive damages.

THE COURT: Ruled out the punitive damages.

* * * * *

RUTH COLEMAN MARTHINSON.

* * * * *

152 DIRECT EXAMINATION

BY MR. CLARKE:

Q. Give us your name, please. A. My name is Ruth Coleman Marthinson.

Q. Where do you live; A. I live at 2506 Upton Street, N.W.

Q. And how long have you lived there? A. Twenty years this coming August.

Q. Were you married? A. Yes, I was.

Q. What was your husband's name? A. Detlow M. Marthinson.

Q. I want to ask you just a few questions about your background. Was your husband in World War I? A. Yes, he was.

Q. What if anything happened to him? A. He was gassed and wounded and hospitalized for quite a long time, and when he returned, he was at Walter Reed for quite awhile, and then he went to Saranac.

153 Q. After World War I, did he return to the service? A. He was in the regular army and retired for disability.

Q. What did he do after World War I, after he regained some of his health? A. He had to stay outside so he had a fraternity brother, Miller Brothers in Washington, and he gave him a job building houses.

Q. Did he then build houses? A. He built for the Miller Brothers and then went in business for himself.

Q. Then World War II came along? A. Yes.

Q. What did he do during that period? A. He asked to be taken back into the service, and he could not go on active duty. He went on limited duty, because of his war disability. He couldn't go out of the country. He had to serve within the precinct of the United States.

Q. But he did go back into the service? A. He did go back into the service.

Q. When did he get out of the service in World War II? A. 1946.

154 Q. What did he do thereafter? A. He built a few houses. He wasn't terribly well when he came out, but he built a few houses up until the time he had his first heart attack.

Q. When was that; A. 1955, in May.

Q. With reference to the house, 2506 Upton Street, N.W., Washington, D.C., who built that house? A. My husband.

Q. When did he build it? A. I am not sure when it was started. It was completed in 1949, in the late summer.

Q. Did there come a time when you and your husband decided to live in that house? A. Yes, there did.

Q. When was that? A. That was when it was completed in August, 1949.

Q. Did you and your family and husband move there? A. Yes.

Q. And have you lived there ever since? A. Yes, I have.

Q. When the house was completed, did you have a mail slot installed?

A. It is my recollection the mail slot was installed at the same time the door was. I am not sure of the exact date the door was, but it was certainly there when I went in.

155 Q. Was the house inspected by the District of Columbia Building Inspectors? A. Yes, sir. Then it was filed with the building inspector, and they took over the reins.

* * * * *

BY MR. CLARKE:

Q. After the house was completed, and the building inspector called, were you then allowed to move in? A. Yes.

Q. Have you done anything to the mail slot since you moved into the house in 1949? A. I haven't. The inside and the outside of the door have been painted.

Q. Other than painting the door, itself, nobody has done anything to the mail slot? A. No, I am sure they haven't.

156 Q. Has there been any occasion for anyone to do anything to that mail slot up to February 20, 1964? A. No, sir.

Q. Up to February 20, 1964, what was the condition of your husband's health? A. He had two serious aneurysms, and he had an embolism. He had good days and bad days. He was partially handicapped in that he couldn't move around too much.

Q. Did he spend a great deal of time in his living quarters? A. Yes, he did.

Q. Mrs. Marthinson, as you come in the door of the front of your house, tell us what is in there? A. As you come into the front door, I live in what is known as a split level house. There is a flight of steps that go up as you face the door, a flight of steps that go to the right and a little hallway, very small, and steps going down to the living room.

Q. You say, "As you face the door," the front of your house? A. Yes, sir.

Q. The right would be the steps to your bedroom? A. On the lower level.

157 Q. On the right is what? A. As you come in the front door, the steps go up to the bedroom section and down to the living room section.

Q. You are indicating they go up on the right and down on the left? A. Yes.

Q. On February 20, 1964, did you have occasion to notice a mailman was coming to deliver mail to your house? A. Yes, I did.

Q. Did you see him or hear him? A. I saw the truck from the kitchen window, and I had mail that I thought I would try to give to the mailman, but when I got on the landing which was between the two steps, the mail was on the floor, so I stooped to pick it up.

Q. What if anything happened then? A. As I was picking it up, I heard a noise on the outside which sounded like someone moaning, so I opened the front door and Mr. Lofty was standing back from the door, holding his hand, and he was bleeding quite badly.

Q. At this time, you had picked up the mail on the inside and opened the door before you saw him? A. Yes.

Q. At that time, did you have any conversation with him? A. Yes,
158 I asked him what had happened, and he said he hurt his hand in the door.

Q. Did you offer to assist him? A. Yes, I did, and at about this time Colonel Marthinson had come to the landing. He was in the kitchen with me, but he didn't climb stairs as quickly. He didn't go up as fast as I did, and it was a few minutes before he got to the landing.

Q. You were the one who opened the door? A. I was the one who opened the door.

Q. Did you help Mr. Lofty? A. I said I thought I better get something to stop the bleeding. He was bleeding quite badly. His uniform had quite a lot of blood on it. He was holding on to his hand. I said I better get some bandages, and I ran upstairs to get something, and in the meanwhile Colonel Marthinson was at the front door.

Q. Did you return with the bandages? A. I returned with the bandages. I couldn't find any antiseptic but a bottle of Micrin, which is mildly antiseptic.

Q. Did you give it to him? A. He looked at the antiseptic, and he said, "You brought mouth wash," which it was.

Q. Did he have any conversation in your presence? A. Colonel
159 Marthinson wanted to take him to the hospital. He said he couldn't go because he had the mail truck, and he had to take the mail truck back to the post office.

Q. Did he leave? A. Yes.

Q. In the mail truck? A. Yes, sir.

Q. Did there come a time when Mr. Lofty left? A. Yes, there did.

Q. Incidentally, do you recognize Mr. Lofty? A. Yes, I do.

Q. Had Mr. Lofty been your mailman at your house? A. I don't think I had ever seen or spoken to Mr. Lofty before, but I do recognize him. If he came, it was not to my knowledge.

Q. What is the name of your regular mailman? A. His name is Mike. I don't know his last name.

Q. How long has he delivered mail to your house? A. I would say twelve or fifteen years, about that time.

160 Q. During the time you have lived in that house from 1949 up to 1964, when this incident happened, had you ever had any complaint from the mailman on the route or anybody in the post office department about the door slot? A. No.

Q. And you have the same door slot now? A. Yes, I do.

Q. And are they still delivering mail? A. They are still delivering mail.

Q. Did Mr. Lofty come back to your house with Mr. Smith a little later on? A. Yes, he did.

Q. You heard the measurements given by the plaintiff relative to the door slot, being seven inches wide. Is that correct? A. Yes, sir.

Q. Which ran one-eighth of an inch wider inside. Is that correct? A. That is correct.

Q. And two inches, I guess it is two inches and seven inches long. Would that be right, and the testimony is that it is 37 inches tall from the

outside. A. Yes.

Q. And a little shorter than that from the inside. Is that right? A.
161 Yes.

Q. And the thickness of this door is how thick? A. Around two
inches.

Q. And you are familiar with the pictures that have been put in evi-
dence? That is your door showing on Plaintiff's Exhibit No. 2? A. It
is my door.

Q. And Plaintiff's Exhibit No. 3 gives the full view of the door? A.
Yes.

Q. Is that right? A. Yes, it is.

Q. And Plaintiff's Exhibit No. 1 is the inside of your door? A.
That is right.

Q. Looking out front, and that is the way it has been all the time?
A. And that is the way it has been all the time.

Q. Now, I want to know if you and Colonel Marthinson were the only
ones who were home on the day that this happened? A. Yes, we were.

Q. Were either of you anywhere near that front door when the mail
came in? A. No.

162 Q. As I understood, you were on your way there? A. I was on
my way there and I heard the mail drop on my way to the kitchen door
and I still had to go up and around.

Q. To your knowledge, was anyone around that mail slot, other than
the mailman? A. No.

Q. After the incident, did you notice that the flap was in anyway
bent? A. The flap was bent. If you looked at the door, the left side

was lower than the right side, and it was a little. You could see the daylight more plainly through the left side than the right.

Q. Can you show on that drawing, on the picture? A. This side was pulled. It was a little bit lower. This was bent out a little.

Q. When you say this side was a little bit lower, you are referring to the right hand side of the picture? A. I am referring to the right-hand side of the picture.

Q. As you look at it, what is on the right-hand side there? A. There was more daylight coming in under this one than that and there was a breeze that came through there.

163 Q. When you say there was more daylight, you mean the daylight came from the left side of the picture as you look at it? A. Yes, sir.

Q. Was it that way when Mr. Lofty had his accident? A. I don't know. I don't remember it before.

Q. Did you notice any air? A. There was a draft that came through there, and we put a plastic over it when it was too cold.

Q. That was after his accident? A. That was after his accident.

Q. You did not notice it before? A. No, I did not notice it before.

Q. Did you notice whether the flap was bent? A. I didn't look. Colonel Marthinson looked, but I didn't.

Q. All right. That is all right. Is it true, Mrs. Marthinson that the flap of the door goes inward? A. Yes, it does.

Q. And is it hinged at the top? A. It is hinged at the top.

Q. And is there a spring at the top? A. There is a spring at the top.

Q. Had you ever to your knowledge known that flap to stick open?

A. No, I don't see how it could stick open.

164 Q. My question, had it ever stuck open? A. It had never stuck open to my knowledge.

Q. Were you the one who picked up the mail daily as it came in the door? A. Yes, I was.

Q. Was that to save your husband that many steps? A. Yes.

Q. Following this incident, did the supervisor of the Cleveland Park Post Office come and inspect your mail slot? A. Yes, he did.

Q. And following that inspection, mail continued to be delivered there. Didn't it? A. Yes, it did.

* * * * *

CROSS EXAMINATION

BY MR. LESTER:

Q. Mrs. Marthinson, could you tell the jury the date that the Cleveland Park inspector came by to inspect the mail slot? A. No, I couldn't. It was within a—shortly after the accident, but I don't remember the date.

Q. You don't remember how long? A. No, I don't.

165 Q. Was anybody with him? A. No, as they were, they were outside. They did not come into the house.

Q. Did he speak to you? A. Yes, I believe both my husband and I were present.

Q. Did he come inside the house? A. He came inside the house.

Q. And looked at the mail slot? A. And looked at the mail slot.

Q. Did he give any indication that he noticed the mail slot was damaged?
A. No, I don't remember that he did.

Q. Your counsel has shown you Exhibit No. 2, which I believe you identified. A. Yes.

Q. You identified it as a view of the front door? A. It is the front door from the outside.

Q. And this is a full view of the front door? A. Yes.

Q. You mentioned the door had been painted. Can you remember when the door was painted last prior to this accident? A. It was painted within the last two years.

Q. Prior to the accident? A. Prior to the accident.

166 Q. When was the last time it was painted prior to the accident? A. I don't remember that. It has been four years.

Q. Would you be able to estimate when it was painted? A. I might be able to find the bill for it or the cancelled check, but it has been a long time, and I had it painted within the last two years.

Q. Was the color that this door was painted, green? A. A very dark green.

Q. Was the color of the door and the appearance of the door substantially the same as it was since the house was built? A. Approximately. I don't know of any coat of paint that has gone on since, exactly, but it is supposed to be about that same color.

Q. You mentioned this house was built in 1949. Is that correct? A. Finished in 1949.

Q. Do you happen to know whether or not this door was purchased new? A. It is an old door.

Q. It is an old door? A. Yes.

Q. I wonder if you could tell us where the old door came from. A. Yes, I could.

167 Q. Where did it come from? A. From the house of Judge Payne at the corner of 16th and I.

Q. When was the Judge Payne house built? A. I don't know, but I have the duplicate of this.

Q. Would you say the door was 75 years old? A. I don't know the history of it.

Q. Is it the same slot that was in the door? A. No, that was not in the door.

Q. That was purchased new? A. All I am going to say is we had double doors when I bought it, and the other door has no slot in it, and I am quite sure this one was put in at the time it was built.

Q. You don't know where the mail slot came from? A. I don't know really where it came from.

Q. Do you know whether or not Judge Payne's house that you mentioned this door came from, was a house that was demolished and the door was obtained after it was demolished? A. I am not sure. I know the house was demolished, but I think it was bought when the house was remodeled by Mr. Horace Peasley.

Q. It is your best recollection that this door had the mail slot put into it after you obtained the door? A. That is my impression.

Q. But you are not certain, however? A. I am not certain.

168 Q. Did you have a certain handy man around the house to do chores? You mentioned the Colonel wasn't in robust health. A. My husband had a foreman that he had ever since he went in business. He does carpentry work and things like that and still does.

Q. Do you recall at any time anyone's ever oiling the spring on this box here? A. I can't recall, but I wouldn't think that. I know it isn't the type of spring that would need oil. It is a metal coil spring, and there wouldn't be any particular reason to oil it.

Q. There are hinges at the top. Aren't there? A. Yes, but so far as I know, those were never touched.

Q. They never were oiled? A. Not that I know of.

* * * * *

CHESTER MANOFF

* * * * *

DIRECT EXAMINATION

BY MR. CLARKE:

169 Q. Will you give us your full name, please? A. Chester Manoff.

Q. Where are you employed? A. Washington City Post Office.

Q. February 20, 1964, where were you employed? A. Cleveland Park Station of Washington, D.C. Post Office.

Q. What was your position? A. Superintendent.

Q. Will you repeat your last name? A. M-A-N-O-F-F.

Q. And your position at the Cleveland Park Post Office? A. Superintendent.

Q. Mr. Manoff, when you were superintendent was Mr. Lofty one of the employees at the station? A. Yes, he was.

Q. You recall the day that he was injured? A. Yes, sir, I do.

Q. And after Mr. Manoff was injured, did you go to the home of Mr. and Mrs. Marthinson and inspect the door slot? A. Yes, after he had been taken to the hospital and cared for.

170 Q. Do you know when it was you went to the house and inspected the door slot? A. That same day. I couldn't tell what time, but it was the same day. He hadn't finished the route. That was arranged for and I went out there the same date.

Q. When you went out there, did the Marthinsons come around and show you the door? A. No, sir no one came to the door. I don't recall meeting anyone.

Q. Did you inspect the door from the outside? A. Yes, sir I did.

Q. Did you come back and inspect the door slot when Mr. and Mrs. Marthinson were there? A. Yes, sir.

Q. So you did inspect it twice? A. Yes, sir.

Q. What did you see on your first inspection? A. It is a detached house with a rather heavy door, and door slot. I pushed the door slot open and put my hand in and put my hand out to see what there was to it, and I recall that there is a little step there from the door, a stone step four or five inches high, just in front of the door.

Q. And did you find that the door slot complied with mail regulations?

MR. COLLINS: I object to your question and the answer because this man has not been called as an expert to determine —

MR. CLARKE: I will withdraw that question.

171 MR. COLLINS: May we approach the Bench, please?

THE COURT: You may.

(AT THE BENCH)

MR. COLLINS: I ask for a mistrial because counsel for the defendant brought into the record a compliance with postal regulations.

MR. LESTER: This is an outrage.

THE COURT: The matter was withdrawn. Counsel may proceed.

MR. COLLINS: Are you overruling my motion for a mistrial?

THE COURT: Overruled. Counsel may proceed.

BY MR. CLARKE:

Q. Mr. Manoff, following your two inspections of the Marthinson house, did the mailman continue to deliver mail at the Marthinson house?

A. Not Mr. Lofty.

Q. Was Mr. Lofty the regular postman? A. No.

Q. Mr. Lofty was the substitute mailman? A. Yes, sir.

Q. What was the name of the regular mailman? A. Michael Simone.

Q. Is he still the regular postman? A. Yes, sir.

172 Q. And the post office department still delivers mail and uses that mail slot?

A. So far as I know. I haven't been out there for several years.

Q. Not since the time you have been out there? A. That is right.

* * * * *

CROSS EXAMINATION

BY MR. COLLINS:

Q. Could you tell the jury, please, the approximate date that you first went to the Marthinson residence to inspect the mail slot? A. Well, I am not quite sure of the date, but I know it was the same date of the accident. It was in the winter of 1964, possibly in the month of February.

Q. A week later? A. No, the very same day, yes, indeed.

Q. What did your inspection consist of when you looked at the outside of the door? A. There was some question in my mind whether the finger tip had been found. My trip there was to see if I could locate it. I asked Mr. Lofty and Mr. Smith to get the finger tip, to have it sewed up at the hospital. I checked back to see if that was done. No one came to the door. I casually tried the slot. The supervisor asks for a report of all incidents, so I visited the scene.

173

Q. You visited the scene to see if you could find the finger tip? A. To find out whether they had it, to see if it was still there. I had no communication with them after they left.

Q. You didn't know what hospital they were going to? A. No, I didn't.

Q. Did you suggest to them that they go back to look for the finger? A. Yes, I did.

Q. Who did you suggest that to? A. Smith and Lofty.

Q. How long after your first visit did you go back the second time? A. I couldn't say exactly. It probably would have been that week or the early part of the next week.

Q. And Mr. and Mrs. Marthinson were home? A. Somebody was home. I don't remember whether it was Mr. Marthinson or Mrs. Marthinson. I did not know them previously.

Q. You went inside the house this time? A. No. When they opened the door, I was in the hallway.

Q. What did you do, examine the interior of this mail slot?

174

A. Yes, the back of it and the front end of it.

Q. Had you inspected the lower edges and top edges, the spring and

174 hinge? A. I assume I examined the hinge. As I recall that slot, the hinge would be out of sight.

Q. You couldn't see the hinge? A. No.

Q. Did you feel the hinge? A. No, I didn't feel the hinge.

Q. Did you report any damage to this mail slot? A. Damage, no.

REDIRECT EXAMINATION

BY Mr. CLARKE:

Q. The mail slot look in good condition to you? A. Yes.

* * * * *

177

Washington, D. C.
Wednesday, February 26, 1969.

* * * * *

178

MICHAEL JOSEPH SIMONE

* * * * *

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Would you give us your full name; A. Michael Joseph Simone.

Q. Where do you live? A. 8410-11th Avenue in Silver Spring.

Q. Where do you work? A. Post Office in Cleveland Park Branch.

Q. What is the nature of your job there? A. Carrier.

Q. How long have you been employed in that job? A. April, 1941.

Q. Are you the carrier that served the 2500 block of Upton Street,
N.W.? A. Yes, sir.

Q. How long have you been on that particular route? A. Well, roughly
around 1946 and 1947, I can't give you the exact date.

179 Q. Are you still on that route? A. Yes, sir.

Q. You were on that route when the Marthinson house was being built?
A. Yes, sir.

Q. And you have served that house ever since it was built? A. Yes, sir.

Q. And you have put letters in the mail slot? A. Yes, sir.

Q. You have put them in there ever since it was built, up to the present
time? A. Yes, sir.

Q. You have never had any trouble with that mail slot. Have you?

A. No, sir, I haven't.

* * * * *

CROSS EXAMINATION

BY MR. LESTER:

* * * * *

181 Q. I show you what has been marked Plaintiff's Exhibit No. 2. Do you recognize that? A. It is a mail slot with Mrs. Marthinson's name on it.

Q. This mail slot that you have just looked at, can you tell me whether or not in your recollection there has ever been any change in its appearance since the first day you have ever delivered mail to the house. A. No, sir.

Q. You can't tell me, or there is no change? A. I don't think there has been any change to it.

Q. No change? Now, in your experience as a postman, have you ever seen a mail slot exactly like that one? A. Sir, I don't know what you mean, a mail slot exactly like this.

182 Q. Did you ever see anyone like it before? A. There are similar mail slots exactly like this, the shape.

Q. I am asking you precisely did you ever see one exactly like that? I am not asking you for similar. I am asking you if you ever saw one exactly like that. A. You mean the same size and everything?

Q. Yes, sir, and the word, "Papers," on it, the same construction.
A. Well, I couldn't say, sir.

Q. Now, when you were on the inside of the Marthinson house, did you ever have occasion to look at the inside view of the mail slot? A. No, sir.

Q. Never had occasion to do that? A. No, sir.

Q. Now, in the course of your duties in delivering mail to the Marthinson residence, did this mail slot ever stick on you? A. No, sir.

Q. It never stuck? A. No, sir.

Q. Could you tell me whether or not at the present time that there is any damage to that mail slot? You deliver mail there every day. Don't you?

183 A. Well, not in the last three days, sir.

Q. You did within the last week? A. Yes, sir.

Q. At that time, did you notice any defective condition of that mail slot or box? A. No, sir.

Q. You didn't notice that the mail slot was bent? A. No, sir.

Q. Now, you have testified that you have been delivering mail on the route on which the Marthinsons live for how many years, sir? A. Well, since 1946 or 1947, I don't know, sir.

Q. You have been continuously delivering mail on that route. Is that right? A. Yes, sir.

* * * * *

184 Q. Now, is it a fair fact to say in the course of your duties over the years, having delivered mail to the same route, that you became rather familiar with the patrons on your route? A. Yes, sir.

Q. Would it be fair to say that when it was cold weather that they might invite you in for a cup of coffee? A. Mrs. Marthinson?

Q. Anybody on the route. A. Anybody, yes.

Q. Yes, over the course of years, you could almost become a member of the family as a postman. You bring them good news or sad news and get to know their problems. A. Sometimes.

* * * * *

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. Mr. Simone, you say you have similar mail slots on your route? A. I don't know whether they are similar. They are the same size with the papers. When it has got marked, "Papers," on it, I don't know.

Q. Except for the word, "Papers," would they be similar? A. Yes.

* * * * *

185 Q. With the word, "Papers," the other mail slots on the routes are similar? A. Yes, sir.

MR. CLARKE: The defendant rests.

THE COURT: The defendant announces rest. Any rebuttal? Counsel approach the Bench.

(AT THE BENCH)

THE COURT: Defendant has rested. Does the plaintiff have anything further?

MR. COLLINS: We have nothing.

* * * * *

(There was Argument by Counsel for the Plaintiff and for the Defendants to the Jury.)

* * * * *

(The Court instructed the Jury.)

* * * * *

217 You will please remain in your seats so that the Court may afford counsel an opportunity to approach the Bench.

(AT THE BENCH)

* * * * *

MR. COLLINS: We will take an exception to the Court. We renew a motion for a mistrial for the record.

THE COURT: Those are noted and the Court has endorsed in the proper manner the Court's ruling in the case. You have any exceptions or objections

to the Court's instructions, and you have an exception to the Court's failure to grant your motion.

218 MR. CLARKE: Your Honor, I think I better Reserve the motion for a directed verdict before the jury goes out without arguing.

THE COURT: That motion will be noted. Anything else?

* * * * *

219 THE COURT: Ladies and gentlemen of the jury, you will now retire to deliberate.

* * * * *

(IN CHAMBERS)

THE COURT: The Court has received from the jury the following note: "Judge, Your Honor, is it proper for the jury to inquire of you in case we file for the plaintiff, the maximum of liability?" In a separate handwriting appears the words, "Jessie T. Smith," and in the same handwriting as the above note, the words, "Jessie T. Smith," appears the word, "Foreman."

The note has been read to counsel for the plaintiff and counsel for the defendant in Chambers by the Court, and after colloquy between Court and counsel, the Court has endorsed on the foregoing note in the Court's handwriting, the following: "The jury is to return its verdict, based upon the evidence and the instructions as to the law, which the Court has given you. Charles F. McLaughlin."

220 The above note and the endorsement thereto will now be returned to the jury by direction of the marshal.

* * * * *

[Filed February 26, 1969]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 24th day of February, 1969, before the Court and a jury of good and lawful persons of this district, to wit:

Mrs. Jessie L. Smith

Roger T. Lee

Ben W. Milhouse

Mrs. Eldner L. Wiggins

Mrs. Pauline N. Earman

Miss Angie E. Thompson

Mrs. Beatrice L. Shields

Mrs. Madeline P. Elder

Mrs. Ruby L. Fitts

Henry M. Watson

Miss Frances V. Nichols

Mrs. Delenia F. Jackson

who, after having been duly sworn to well and truly try the issues between Jerome W. Lofty, plaintiff and Ruth Coleman Marthinson, executrix of last will of Detlow M. Marthinson, deceased and Ruth Coleman Marthinson, defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 26th day of February, 1969, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendants by reason of the premises is the sum of Twenty-five thousand dollars (\$25,000.00).

WHEREFORE, it is adjudged that said plaintiff recover of the said defendants the sum of Twenty-five thousand dollars (\$25,000.00) together with costs.

Robert M. Stearns, *Clerk*,

By: /s/ _____
Deputy Clerk:

Judge Charles F. McLaughlin, Presiding.

[Filed March 5, 1969]

**MOTION OF THE DEFENDANTS, RUTH COLEMAN MARTHINSON,
INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF
DETLOW M. MARTHINSON, DECEASED FOR JUDGMENT NOT-
WITHSTANDING THE VERDICT OR IN THE AL-
TERNATIVE FOR NEW TRIAL OR REMITTITUR**

Come now the Defendants by and through their counsel, Galiher, Stewart & Clarke, and move this Honorable Court to set aside the verdict entered and the judgment entered in the above entitled action on Wednesday, February 26, 1969 and enter a judgment non obstante veredicto, or in the alternative, grant these Defendants a new trial or order a remittitur on the following grounds:

1. The verdict is contrary to the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is contrary to the law.
4. A verdict should have been directed in favor of the Defendants as a matter of law.
5. The Court erred in refusing to grant the Defendants' Motion for a directed verdict made at the close of the Plaintiff's case and renewed again at the close of all of the evidence.
6. There was no evidence of any negligence on the part of these Defendants which was the proximate cause of the injuries sustained by the Plaintiff.
7. The Court erred when it instructed the jury on the unexpected emergency or eminent danger theory being Plaintiff's jury charges numbers 7 and 8.
8. The evidence shows that the sole proximate cause of the Plaintiff's injuries was his own sole negligence.
9. There was no sufficient or substantial evidence to support the amount of the jury's verdict.

10. The verdict was excessive and appears to be given under the influence of sympathy, passion and prejudice.

11. The sympathy, passion and prejudice of the jury was shown in the note directed to the Judge while the jury was deliberating wherein they wanted to know could they give the Plaintiff "the maximum liability".

12. The Plaintiff failed to prove that the Defendants had either actual or constructive notice of any defective or dangerous condition.

13. The Plaintiff failed to prove that a defective or dangerous condition existed.

Galiher, Stewart & Clarke

By /s/ _____

William H. Clarke
Attorneys for Defendants
1215 - 19th Street, N. W.
Washington, D. C. 20036
FEderal 7-8330

POINTS AND AUTHORITIES

Rule 50A of the Federal Rules of Civil Procedure.

Rule 59A of the Federal Rules of Civil Procedure.

Rule 50A of the Federal Rules of Civil Procedure allows for the filing of a motion for a directed verdict, and Rule 59A allows for the filing of a Motion for a new trial if made within ten (10) days, and this Motion is made within that time.

A supplemental memorandum of Points and Authorities will be filed.

/s/ _____
William H. Clarke

[Certificate of Service March 4, 1969]

[Filed April 1, 1969]

**POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF THE
DEFENDANTS, RUTH COLEMAN MARTHINSON, INDIVIDUALLY
AND AS THE EXECUTRIX OF THE ESTATE OF DETLOW M.
MARTHINSON, DECEASED FOR JUDGMENT NOT-
WITHSTANDING THE VERDICT, OR IN THE AL-
TERNATIVE, FOR NEW TRIAL OR REMITTITUR**

The grounds upon which the Defendant, Ruth Coleman Marthinson, individually and as executrix, seeks relief from the verdict heretofore entered herein are as follows:

A. That the verdict is contrary to the law and evidence (Grounds 1 - 6 inclusive, 8, 12 and 13);

B. That the Court erred in granting Plaintiff's instructions 7 and 8 as to "unexpected emergency and eminent danger" (Ground 7) and

C. That the verdict far exceeds the maximum limit of a reasonable range of any verdict that the jury could have reached and that the verdict on its face reflects sympathy, passion and prejudice (Grounds 9, 10 and 11).

It is respectfully submitted that the Defendants' Motion on these grounds should be granted.

The first of the grounds upon which Defendants rest the motion for relief asserts broadly that the verdict is contrary to the law and evidence and that the Defendants' motion for a directed verdict first made when Plaintiff had rested his case and again after both sides had rested should have been granted. It is well established that such a verdict is clearly erroneous and should be set aside. A consideration of the record sustains Defendants' position in this respect.

The Plaintiff's case was essentially simple and established only one fact—that he had suffered an injury to the fleshy part of his forefinger while delivering mail to a house along the route he was serving as a substitute mail

carrier. Noticeably and significantly absent from Plaintiff's proof and fatal to his cause was proof of any negligence on the part of the Defendants. The regular mail carrier had delivered mail to this same house and in the same manner for years and has continued to do so since the Plaintiff suffered the complained of injury, all without injury or incident. Plaintiff did not show any unusual circumstances attendant upon his delivery of the mail on the day the injury occurred, and in fact no unusual circumstances either have existed or now exist. In these circumstances, it must necessarily follow that Plaintiff has failed at the threshold to establish that his injury was in any way proximately caused by the Defendant. In these circumstances, his cause must fail, and the verdict of the jury must be set aside.

Plaintiff's failure of proof as indicated, began with his failure to show that Defendants had or should have had notice that the mail slot was in any way a hazard to the user and that the delivery of mail by use of this slot in any way constituted negligence by the Defendants. *McIntosh v. Greenway Apartments, Inc.*, 164 A.2d 351 (D.C. Mun. App., 1960); *D. C. Transit System, Inc. v. Smith*, 173 A.2d 216 (1961); *Napier v. Safeway Stores, Inc.*, 215 A.2d 749 (1965); *F. W. Woolworth Co. v. Williams*, 59 App. D. C. 347; *Selby v. S. Kann Sons*, 64 App. D. C. 36; *Domel v. Managers, Inc.*, 109 U. S. App. D. C. 370, *Martin v. U. S.*, 96 U. S. App. D. C. 295; *John B. Kelly, Inc. v. Donald Dunnett*, D. C. Cir., No. 21,522, decided June 10, 1968; and *Jones v. D. C.*, 123 A.2d 364 (1956) 397 F.2d 711.

These cases establish that for Defendants to be liable to Lofty, the latter must show that the premises on which he was required to go were dangerous, that the danger was either created by the Defendants or was known to the Defendants, and that the Defendants were negligent in maintaining these premises in this dangerous condition and in failing to inform the Plaintiff of such danger. These are simple requirements which equitably apportion responsibility to both Plaintiff and Defendants. That the delivery of mail through the mail slot posed a danger to the mailman was an essential part of Plaintiff's case,

and Plaintiff failed to establish this fact. It necessarily follows that Plaintiff having failed to carry this burden the resultant verdict is contrary to the law and evidence, and Defendants' motions for a directed verdict should have been granted.

II.

The second of the grounds upon which Defendants rely challenges the propriety of instructions 7 and 8 which singly and together are clearly erroneous. The vice of these instructions is such that it can be effectively cured only by either a judgment notwithstanding the verdict or the grant of a new trial.

The initial error into which these instructions fall is that Plaintiff presented to the jury a distorted view of what in fact occurred at the precise moment when the Plaintiff suffered injury. These instructions converted a quiet, peaceful chore—the delivery of mail—into an emergency fraught with impending and imminent danger in which the Plaintiff, as an innocent and unwilling participant, was excused from all responsibility in seeking extrication.

This is not such case.

Plaintiff was not confronted by an emergency situation which either required him to act precipitately or excused him from the responsibility for his action by reason of such emergency. *Grober, et al v. Capitol Transit Company, et al*, 119 F. Supp. 100, 103 (D. C. D. C. 1954), *Hecht Co. v. Jacobsen*, 86 U. S. App. D. C. 81, 84, 180 F.2d 13 (D. C. Cir. 1950).

The Court in the *Grober* case stressed that:

“One charged with ordinary care is under an obligation to apply such care to all situations—foreseen and unforeseen. One is not excused from all errors of judgment in an emergency by the fact that he is compelled to act immediately upon the sudden happening of an event.”

The error in the instructions it thus twofold: (1) it created an artificial and distorted scene for the jury, to the detriment and prejudice of the Defendants, and (2) relaxed the standard of care to which Plaintiff should be held accountable. In effect, these instructions informed the jury that the Plaintiff was blameless, that he could not be held to be contributorily negligent with the consequent result that in the light of these instructions, the Court virtually directed a verdict for the Plaintiff. That the jury so understood and applied the Court's instructions is obvious from the size of the verdict and from the question addressed to the Court by the jury whether it could award "the maximum liability" to the Plaintiff.

That a verdict based on erroneous instructions, our instructions misconstrued and mis-applied by the jury, is a faulty verdict which cannot stand, is again well established. (See this Court's memorandum at page 3 in *McGill v. Hicks, et al*, C. A. No. 1469-66, February 27, 1969). This jury clearly understood this Court to instruct as a matter of law that the Plaintiff encountered an "unexpected emergency", one of "impending danger" and "imminent danger", all of which presented a distorted, re-construction of the scene as well as the occurrence to the prejudice of the Defendants.

There was no emergency.

There was no impending danger.

There was no imminent danger.

Plaintiff was performing a routine task in calm and peaceful surroundings. He was never in danger. He was never confronted with an emergency, and it might be parenthetically noted that even if he were confronted with an emergency, and it might be parenthetically noted that even if he were confronted with an emergency that he was still under an obligation to act with ordinary care. *Grober v. Capitol Transit Company, Supra*.

Nevertheless, this is the picture which the Court as a matter of law presented to the jury, and apparently the jury never questioned that it was to

bring in a verdict for the Plaintiff. The only question in the mind of the jury was the limit of such verdict—whether they could give the Plaintiff “the maximum liability”.

To recapitulate: the complained-of instructions erroneously negated negligence and contributory negligence on the part of the Plaintiff; relaxed the standard of care imposed on and required of the Plaintiff; concomitantly established negligence on the part of the Defendant; deprived Defendant of the benefit of a defense of contributory negligence, and in finality, virtually directed a verdict for the Plaintiff. This result, it is respectfully submitted, can be cured only by judgment notwithstanding the verdict, or the grant of a new trial.

III.

Defendant in this portion of the Motion seeks relief from a verdict which “. . . is so unreasonably high as to result in a miscarriage of justice . . .” [*Frank v. Atlantic Greyhound Corp.*, 172 F. Supp. 190, 191, (D. C. D. C., 1959),] and is “. . . so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury might properly operate . . .” [*Graling v. Reilly*, 214 F. Supp. 234, 235 (1963),] *Taylor v. The Washington Terminal Company*, _____ U.S. App. D. C. _____, _____ F.2d _____, February 20, 1969, Slip Op. 6. Measure by these cases, the verdict in the cause now before the Court cannot stand.

Taylor is significant at this point for the reason that it establishes a firm line of demarcation between the jurisdiction of the trial court to decide in the first instance whether a jury verdict is excessive and the jurisdiction of the appellate court to review this determination. In this connection the Court in *Taylor* (Slip Op. 6) said

At the appellate level, in reviewing a trial judge’s grant of a new trial for excessive verdict, we should not apply the same standard. The trial judge’s view that a verdict is outside the proper range deserves considerable deference. His exercise of discretion in granting the

motion is reviewable only for abuse. Thus we will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was clearly within "the maximum limit of a reasonable range". (Underscored in original.)

The net of the holding in *Taylor* is that in the District of Columbia it would appear that the function of a trial court to determine whether a verdict is excessive is a broad one and that conversely the function of appellate review is limited.

Thus the scope of the trial court's consideration of a motion which challenges a jury verdict as excessive has been expanded by *Taylor* and with this expansion additional responsibility rests with the trial court. It is in this context that we ask that this court consider this portion of this motion.

That the verdict clearly exceeds the maximum limit of a reasonable range is obvious and apparent. It clearly reflects the jury's feeling that there has been an injury, and that the injured person must be compensated for such injury without regard to liability for such injury as established by the record. Defendants have denied liability and re-assert that they have sustained that position. It necessarily follows that any verdict for any sum is excessive. Remittitur cannot cure this verdict. *Ford Motor Co. v. Mahoney*, 205 F.2d 267, 4th Cir., 1953; *Becksted v. Skelly Oil Co.*, 131 F. Supp. 940; *Leinbach v. Pickwick Greyhound Lines*, 135 Ken. 40, 10 P.2d 33; and *Western and Atlantic Railroad v. Wright*, 79 Ga. App. 733, 54 S. E. 2d 655.

In *Becksted v. Skelly Oil Co.*, *supra*, the Court was confronted with the problem as to whether a new trial should be granted outright or whether the new trial should be conditioned on remittitur. The Court there resolved that question as follows:

A new trial must be granted and I have been in a quandary as to whether the authority to make the granting thereof conditional upon a remittitur of the excessive portion of the verdict. After reading the cases, I am

satisfied that the entire verdict is vitiated and that it cannot be cured by a remittitur. *Ford Motor Co. v. Mahoney*, 4th Cir., 1953, 205 F.2d 267; *Brabhan v. State of Miss.*, 5th Cir., 1938, 96 F.2d 210; *National Surety Co. v. Jean*, 6th Cir., 1932, 61 F.2d 197; *Minneapolis, St. P. & S.S.M. Ry. Co. v. Moquin*, 1931, 283 U. S. 520, 51 S. Ct. 501, 75 L.ED. 1243. A new trial is

In summary then, Defendants urge at this point that the verdict is so tainted that it cannot stand and that a new trial conditioned on remittitur is inappropriate. Defendants urge that either judgment notwithstanding the verdict should be entered or a new trial be granted.

But, assuming *arguendo* that Plaintiff was injured by Defendants' negligence, it is abundantly clear that the verdict is contrary to the evidence, and is clearly in excess of the maximum limit of a reasonable range. And, as indicated, the responsibility for making such an initial determination now rests more firmly with the trial court for it is clear that in the light of *Taylor*, the law in this jurisdiction is that a verdict beyond such maximum range should be reversed by the trial court. Rule 59(d), F.R.C.P., *Ford Motor Co. v. Mahoney*, *supra*, and *Graling v. Reilly*, *supra*. Such is the verdict here. The gross amount of the verdict, \$25,000.00, exceeds by far compensation for out-of-pocket expenditures, any possible loss of future earning power, pain and suffering endured, and any pain and suffering which may have to be endured by the injured in the future. These are obvious facts beyond dispute and rest upon the record.

Medical expenditures—doctors' and hospital bills—total only \$2,241.73. Treatment was concluded in August of 1964, and there was no evidence of pain and suffering continuing into the future. The Plaintiff's doctor testified that the operation on Plaintiff's finger was a success. Neither was there any evidence that Plaintiff's economic pursuits were in any way substantially curtailed or that any social embarrassment (except for a possible inability to bowl) was suffered because one finger is slightly shorter than the other.

In fact, a candid and objective review of the record inevitably and unerringly leads to the conclusion that the jury clearly ignored the Court's ruling that Plaintiff had not made out a case of gross negligence, and therefore, was not entitled to an instruction to award punitive damages. The damages awarded, in fact, are punitive. In short, the jury awarded damages to which the Court believed the Plaintiff was not entitled.

Taken as a whole and when measured against verdicts in similar cases (*Frank v. Atlantic Greyhound Corp.*, 172 F. Supp. 190 (D.C. 1959), it is evident that the verdict is monstrous, excessive and should shock the conscience of the Court. It is clearly a verdict which must be set aside either in totality or remitted substantially, if precedents in this jurisdiction are to be respected and followed *Hecht Co. v. Jacobsen*, 86 U.S. App. D. C. 81, 180 F.2d 13 (1950), *Washington v. W. V. and Md. Coach Co.*, 250 F. Supp. 888 (D.C.D.C., 1966).

In *Hecht v. Jacobsen*, *supra*, the Court affirmed a verdict of \$15,000.00 for the loss by a child of a finger in an escalator accident. An unsightly scar required plastic surgery. It is to be noted that in this case there was involved a child, an amputation, and a traumatic injury and experience. None of these factors are present in *Lofty*. In these circumstances, the verdict in *Lofty* must be either set aside or a new trial awarded conditioned upon the acceptance of a substantial remittitur.

The case law on this question is overwhelming. Extensive and exhaustive annotations are to be found in 102 ALR 1125, 16 ALR 2d 3, and 393, and 11 ALR 3d 9. The trend is unmistakable—increasing control by the Court of the size of the jury awards, by liberally granting remittitur when it appears that the verdict is disproportionate to the claimed injury. Whether this rests on a determination by the appellate court that the verdict was so excessive that the jury must have acted out of passion, bias, prejudice, or of speculation, or that the jury was misled by either erroneous or inadequate instructions, the result is the same—closer scrutiny by trial courts of the verdict, and a willingness

to exercise and apply the restraint of remittitur, when it appears that not to do so will result in an injustice. It may well be that this trend reflects an awareness by the bench of what juries apparently know when they step into the box, that the burden will fall upon an insurer rather than upon the negligent defendant. If so, the bench in so doing is moving into the arena in which the causes are in fact litigated. Again, if so, it is believed this is desirable.

In this Motion Defendants have earnestly attempted to place this question in perspective and to ask only that this Court acting on precepts and practices which are traditional hold that this verdict for the injury alleged and on the record made is excessive and that therefore the relief herein requested should be granted.

Respectfully submitted,

Galiher, Stewart & Clarke

By: /s/

William H. Clarke
Attorneys for Defendants
1215 - 19th Street, N. W.
Washington, D. C. 20036
FEderal 7-8330

[Certificate of Service March 28, 1969]

[Filed April 22, 1969]

**OPPOSITION TO MOTIONS OF THE DEFENDANTS, RUTH
COLEMAN MARTINSON, INDIVIDUALLY AND AS
THE EXECUTRIX OF THE ESTATE OF DETLOW M.
MARTINSON, DECEASED FOR JUDGMENT NOT-
WITHSTANDING THE VERDICT OR IN THE AL-
TERNATIVE FOR NEW TRIAL OR REMITTITUR**

Counsel for the Defendants has filed Motions for Judgment Notwithstanding the Verdict or in the Alternative for New Trial or Remittitur. In support of said Motions, some thirteen (13) grounds were set forth. These thirteen grounds have been summarized in defendants' points and authorities in support of said motion as follows:

"A. That the verdict is contrary to the law and evidence (Grounds 1-6 inclusive, 8, 12 and 13);

"B. That the Court erred in granting Plaintiff's instructions 7 and 8 as to unexpected emergency and eminent danger (Ground 7); and

"C. That the verdict far exceeds the maximum limit of a reasonable range of any verdict that the jury could have reached and that the verdict on its face reflects sympathy, passion and prejudice (Grounds 9, 10 and 11)."

It is respectfully submitted that the defendants failed to meet the burden that has been assumed and therefore the motions should be, and indeed must be, denied.

To discern the basis for defendants' motions one must examine the points and authorities submitted as the motion, itself, does not articulate the precise grounds substantiating the motion. As can be discerned from Plaintiff's Supporting Points and Authorities in Opposition to the Motions of the Defendants, the defendants have failed to analyze the record in this case and further an analysis of the record, in fact, demonstrates that each of the motions of the defendants should be denied.

A particularly defective aspect of defendants' motions going to the basic issue of absence of proof on the part of plaintiff is demonstrated by a failure to consider the effect of the exclusion of a controlling Postal Regulation and detailed offer of proof thereof, made by plaintiff and objected to by defendants. The Court sustained such objection and the Counsel for Defendants injected the issue of compliance with Postal Regulations by defendants, which was the basis of a Motion for Mistrial by plaintiff, which was denied.

WHEREFORE, for all of the foregoing reasons and the reasons set forth in the attached Memorandum of Points and Authorities, the Motions of the defendants should be summarily denied.

Respectfully submitted,

/s/

Philip R. Collins

/s/

Urban A. Lester

Attorneys for the Plaintiff

Suite 1111-1113

1000 Connecticut Avenue, N. W.

Washington, D. C. 20036

April 22, 1969.

[Certificate of Service April 22, 1969]

[Filed April 22, 1969]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO THE MOTIONS OF THE DE-
FENDANTS, RUTH COLEMAN MARTHINSON, IN-
DIVIDUALLY AND AS THE EXECUTRIX OF THE
ESTATE OF DETLOW M. MARTHINSON, DE-
CEASED FOR JUDGMENT NOTWITHSTAND-
ING THE VERDICT, OR IN THE AL-
TERNATIVE, FOR NEW TRIAL OR REMITTITUR

SUMMARY OF ARGUMENT

In essence and significantly, defendants request all three sought after reliefs on the basis that there was a failure of proof by plaintiff in its case in chief. The motion and its supporting memorandum makes no attempt at a detailed analysis of the record. As will be disclosed in more detail hereinafter, the defendants are precluded from the relief sought. Firstly, although the defendants made a motion for a directed verdict at the close of the plaintiff's evidence, the record fails to disclose that the defendants made a motion for a directed verdict at the close of all the evidence. Secondly, by electing to proceed in the presentation of evidence in defense after the denial of the motion for a directed verdict at the close of the plaintiff's evidence, defendants must bear the burden of analyzing that evidence presented in the course of the defense of this case and cross-examination. This the defendants have patently avoided. In regard to a new trial, as well as a judgment *non obstante verdicto*, the plaintiff respectfully calls to the Court's attention that the evidence of the postal regulation and the detailed offer of proof in regard thereto makes it clear that such evidence furnishes even further justification for the verdict which was rendered for the plaintiff.

Defendants complain of the Court's granting plaintiff's Proposed Jury Instructions Numbers 7 and 8. The record, as the Court is well aware, will reflect that plaintiff's Proposed Jury Instructions Numbers 7 and 8 were both denied by the Court.

In regard to defendants' motion for remittitur to the degree it is not based on failure of proof, defendants' argument is bottomed on one brief paragraph in the entire nine page memorandum. *See 3rd full paragraph on page 7 of Defendants' Points and Authorities.* This again emphasizes defendants' failure to analyze the record.

I.

Response to Defendants' Proposition "A. That the verdict is contrary to the law and evidence (Grounds 1 - 6, inclusive, 8, 12 and 13.)"

At the outset, it should be observed that plaintiff's reading of the record discloses that no motion for a directed verdict at the close of all the evidence was made by defendants. It is axiomatic that failure to make such a motion bars as a matter of law the granting of a Motion for Judgment *Non Obstante Verdicto*. See Exhibit "A" (excerpts from transcript of record) and 5 *Moore's Federal Practice*, Para. 50.08, at pp. 2357-2358, and cases cited therein.

On pages 2 and 3, the defendants assert that the verdict rendered in the instant case is contrary to the law and evidence. Specifically, they allege the plaintiff's proof failed to establish any negligence on the part of defendants. Defendants cite numerous authorities which are clearly not controlling in the instant case. These decisions generally go to the proposition that in a public or quasi-public establishment, where there is failure to show who caused a dangerous condition, the existence of such condition must exist for a reasonable time in order to impute knowledge of such condition or actual knowledge must be shown.

In the instant case, the record reflects that the plaintiff was injured by a unique door-flap, which was clearly on its face never designed for delivery of mail and indeed had "Papers" written across the front of it and was clearly being used for a purpose for which it was not intended. In addition, this flap was mounted internally within the door-slot and was spring-loaded. The

testimony further reflects it was unusually heavy. Detailed testimony demonstrated the dimensions of the flap, its thickness and the antique nature of the door. The record further presented to the jury the dimensions of the door-slot, as well as the length of travel through the antique door that the metal flap had to make. Further, the defendant, Ruth Coleman Marthinson, admitted that no inspection or maintenance was ever made of the mail flap, hinges, spring or door-slot. It is uncontroverted that the plaintiff, while delivering mail, encountered a situation which resulted in the amputation of his right middle finger, specifically the spring-loaded heavy flap stuck in the up position and then suddenly crashed down on plaintiff's finger. From the foregoing and the record as a whole, it is clear that the jury was completely justified in finding that the defendants by their actions failed to fulfill their duties to the plaintiff and such failure was reasonably determined to be the proximate cause of the plaintiff's injury. From the foregoing, as well as the record as a whole, it is clear that this Honorable Court's instructions to the jury were supported by the record. See Exhibit "B". Transcript of Record, line 9, page 94 through line 23, page 95.

It is to be noted that defendants' argument in this regard is one that relies totally on the alleged failure of proof in plaintiff's case, although one sentence appears to recognize tacitly the rule that by electing to proceed with evidence after denial of their motion for a directed verdict at the close of plaintiff's case, the entire record of the trial controls the disposition of the case at the close of all the evidence, if a motion for a directed verdict were made at the latter time. With reference to a Motion for a New Trial, the same rule obtains in regard to a consideration of the entire record. See 5 *Moore's Federal Practice*, Para. 50.05, at pp. 2340-2342 and cases cited therein.

Finally, the Motion for a Judgment *Non Obstante Verdicto*, as well as the Motion for a New Trial, would be particularly unwarranted in light of the exclusion of plaintiff's proffer of a controlling Postal Regulation and detailed offer of proof in support thereof. *Curtis v. District of Columbia*, 363 F.2d

973 (D.C. Cir., 1966); *Wetzel v. Jess Fisher Management Company*, 282 F.2d 943 (D.C. Cir., 1960). The prejudicial aspect to plaintiff would be further compounded in any disposition of the instant matter by judgment *Non Obstante Verdicto* or new trial in light of defendants' counsel's injecting into the case compliance with all Postal Regulations before the jury, which was the basis for plaintiff's motion for a mistrial, which was denied.

II.

Response to Defendants' Proposition "B. That the Court erred in granting Plaintiff's instructions 7 and 8 as to 'unexpected emergency and eminent danger' (Ground 7)"

The argument contained on pages 3 through 5 in support of the above proposition is fatally defective in that again its assertion dehors the record. See attached Exhibit "C", which discloses proposed jury instructions 7 and 8 submitted by plaintiff, both of which were denied by the Court.

In addition, it is plaintiff's position that both proposed jury instructions would have been appropriate based on the entire record of the case for it is uncontradicted that defendant attempted to make a strong showing of contributory negligence on the part of the plaintiff, apparently because of plaintiff's actions when the heavy metal flap crashed upon his finger. The record further discloses that both subjectively and objectively plaintiff found himself in a position of a sudden, unexpected emergency and imminent danger. *Safeway Stores, Inc., v. West, et al.*, 86 U.S. App. D.C. 99, 180 P.2d 25, *cert. den.* 339 U.S. 952; *Baltimore & Ohio Railroad Company v. Postom*, 85 U.S. App. D.C. 207, 171 F.2d 53.

III.

Response to Defendants' Proposition "C. That the verdict far exceeds the maximum limit of a reasonable range of any verdict that the jury could have reached and that the verdict on its face reflects sympathy, passion and prejudice (Grounds 9, 10 and 11)."

The main gist of the argument contained in pages 5 through 8 in support of the above proposition sets forth the argument again that the verdict in the instant case reflects an excessive award because there was no evidence of any negligence submitted by plaintiff. This argument and its corollaries have been answered in detail in the two preceding sections of this memorandum. The only place in defendants' argument that any attempt is made to come to grips with the real issue of remittitur is found in the third paragraph on page 7. The significant brevity of this paragraph demonstrating the failure to analyze the record is set forth:

"Medical expenditures—doctors' and hospital bills—total only \$2,241.73. Treatment was concluded in August of 1964 and there was no evidence of pain and suffering continuing into the future. The Plaintiff's doctor testified that the operation on Plaintiff's finger was a success. Neither was there any evidence that Plaintiff's economic pursuits were in any way substantially curtailed or that any social embarrassment (except for a possible inability to bowl) was suffered because one finger is slightly shorter than the other."

Even a cursory review of the record discloses peradventure that the foregoing "analysis" is not supported by the record and is woefully incomplete. The quoted analysis ignores a host of itemized special damages, for example compensation in lieu of wages for which the plaintiff is required on recovery to reimburse the Federal Government, his employer, loss of sick leave, etc. Secondly, it ignores completely the pain, suffering and inconvenience so amply substantiated in the record, for example, again, the plaintiff suffered physically and mentally two serious operations, after one of which he was required to

live for ten days with his hand emplaced in his stomach, and the fact the plaintiff endured a dreaded condition of gangrene. And the assertion that plaintiff suffered no "social embarrassment (except for a possible inability to bowl)" cannot stand the illumination of the record in which was established through testimony of the plaintiff the grave disabilities to perform the most taken for granted, personal tasks by virtue of his finger being emplaced in his stomach.

The same lack of substantiation plagues the assertion that there was no evidence of pain and suffering continuing in the future. The record reflects that the plaintiff still suffers from the accident and medical testimony portrayed that fact and both the medical testimony and testimony of plaintiff presented ample justification for a jury finding of continued and future disability.

Defendants have suggested no reasonable figure. Particularly apropos is the language of District Judge Holtzoff in *Frank v. Atlantic Greyhound Corporation*, 172 F. Supp. 190, 191, where he states that "a great deal of weight must be attached to the verdict of a jury, and verdicts must not lightly be set aside."

CONCLUSION

In the light of all of the foregoing reasons, it is respectfully submitted that all of the defendants' motions should be denied.

Respectfully submitted,

/s/

Philip R. Collins

/s/

Urban A. Lester
Attorneys for the Plaintiff

April 22, 1969.

[Certificate of Service April 22, 1969]

EXHIBIT A
PROCEEDINGS

86 THE COURT: Counsel may proceed.

CROSS EXAMINATION

BY MR. CLARKE:

Q. Mr. Simone, except for the other papers, would they be similar?

A. Yes, somewhat the same size as those mail slots and I think the post office has a regulation what size they have to be.

MR. COLLINS: Objection.

MR. CLARKE: Well taken, Your Honor.

THE COURT: Objection sustained, proceed.

BY MR. CLARKE:

Q. With the other papers, the other mail slots on the routes are similar?

A. Yes, sir.

MR. CLARKE: The defendant rests.

THE COURT: The defendant announces rest. Any rebuttal? Counsel approach the Bench.

(AT THE BENCH)

THE COURT: Defendant has rested. Does the plaintiff have anything further?

MR. COLLINS: We have nothing.

THE COURT: Counsel approach the Bench again please.

(AT THE BENCH)

87 THE COURT: Gentlemen, I am sure you will remember at the very outset of this case that I asked counsel or afforded counsel an opportunity to present instructions and stated I would ask counsel to present these instructions in sufficient time to enable the Court to read and analyze and digest the instructions before the matters are given to the jury, in order that the Court might be as certain as he can be that the instructions proffered are proper or improper or given or not given. I believe I said it was quite customary for me to say that it isn't uncommon even after that request is made to come to the Bench just before the Court is required to give the instructions and hand the Court a sheath of instructions with complete disregard of the request of the Court. Plaintiff's counsel has handed to the Court eleven instructions when we are just on the verge of giving counsel an opportunity to present their arguments in complete disregard of what I asked.

MR. COLLINS: I apologize.

THE COURT: Your apology doesn't help.

MR. COLLINS: In expatiation, we did have some ready yesterday. In view of Your Honor's ruling on the restriction, we had to revise our instructions.

MR. LESTER: That is one reason why we are so late. We did have them here late yesterday afternoon.

THE COURT: Well, we are on the verge —

88 MR. COLLINS: That is like the fellow coming late to army camp when he could have taken an earlier bus.

THE COURT: We are on the verge of presentation of arguments. If we are going to analyze these instructions before arguments are made, we will have to take a recess to enable the court to do so. I regret very much the necessity for that. The plaintiff handed me the instructions early this morning and I haven't had an opportunity to look them over. The plaintiff has handed me eleven of them, so we will have to take a brief recess, I am afraid, and in the meantime, I will look over the instructions and make my ruling.

(IN OPEN COURT)

THE COURT: Ladies and gentlemen of the jury, the Court very much regrets the necessity for another recess, but that has arisen. The Court already told you at the outset of the case that occasions arise when it is necessary for a recess to take place. It has come to the point in the case under the rules and procedures for counsel on both sides to present their arguments to the jury. After that, of course, the Court will instruct the jury as to the law. It is going to be necessary for the Court to have a little time on this matter before proceeding further, so we will have to take this recess and the Court regrets it but will make it as short a time as possible. Bear in mind the Court's
89 admonition to not talk about the case among yourselves while you are out of the Courtroom.

(Whereupon a short recess was taken, after which the hearing was resumed as follows:)

THE COURT: Counsel for the plaintiff may proceed with opening argument.

* * * * *

THE COURT: Ladies and gentlemen of the jury, the time has arrived for the Court to instruct the jury as to the law in this case. You have had experience, as jurors, and are aware of that fact. The instructions will necessarily be somewhat extensive in order that all phases of the case may be covered by the Court. Despite the fact that the happening of an incident involving an accident of this type may be very short and you on the jury may wonder why so much time has been taken in regard to an incident of this brief extent of time, but the fact is, ladies and gentlemen of the jury, that the duty rests on the Court in every case to instruct the jury as to the law and every phase of the law involved in every case that the Court is called upon to sit as a Judge. For that reason, the Court is required to extend the instructions to considerable length.

EXHIBIT B

I will ask you as you were told at the outset that you should give close attention, and I think you have done that to the evidence that has been given and introduced here. It reasonable and prudent person wouldn't do. It is the absence of ordinary care which is required under the circumstances. Ordinary care means that amount of care which a reasonable and prudent person would ordinarily exercise under the existing circumstances, having a proper regard for one's own safety as well as the safety of others. Where normal risks enhance the danger, the degree of care is correspondingly increased.

Under District of Columbia law, a person who goes on another's premises for the purpose of carrying on some transaction thereon for the benefit of both, for himself and the land owner, is an invitee. A person coming on the premises under those circumstances is an invitee. An invitee is a person who goes upon the land of another for the purpose of carrying on a transaction for the benefit of the land owner. Toward an invitee, the owner or occupants of the land is obligated to use ordinary care to keep the premises reasonably safe for the invitee and to refrain from active negligence.

However, the responsibility with respect to the premises is not absolute. It is not that of an insurer. If there is a danger attendant upon the entry, or upon the work which the invitee is to do on the premises, and if such danger arises from conditions not readily apparent to the senses, and if the owner
95 or occupant has actual knowledge of them, or if they are discoverable in the exercise of ordinary care, it then becomes his duty to give reasonable warning of such danger to the invitee. On the other hand, the owner or occupant is not bound to discover defects which a reasonable inspection would not disclose, and he or she is entitled to assume that the invitee will perceive those dangers which would be obvious to him upon the ordinary use of his own senses. The invitee, on the other hand, has a right to assume that the premises he is invited to enter are reasonably safe for the purposes for which the invitation is extended.

The plaintiff alleges that the mail door slot in the defendant's house was in a dangerous condition. It is the plaintiff's duty to prove that the defendant's mail slot was defective or in a dangerous condition.

You are instructed that before you may award the plaintiff a verdict, the plaintiff must prove by a preponderance of the evidence that the defendant knew or should have known of this condition and should have had constructive notice of this condition and did nothing about it. If the person knew that or in the exercise of ordinary care should have known of this condition, then your finding should be for the plaintiff in this case.

You are instructed that no semblance of negligence applies from the mere happening of the accident, or the more

EXHIBIT C

PLAINTIFF'S JURY CHARGE NO. 7

In a moment of unexpected emergency and imminent danger, a person is not held to the use of the best possible judgment or a high degree of prudence that one may be assumed to exercise in an interval of calm, when there is opportunity and time for reflection and deliberation.

Baltimore & Ohio Railroad Company v. Postom, 85 U.S. App. D.C. 207, 171 F.2d 53.

PLAINTIFF'S JURY CHARGE NO. 8

An act done in the presence or under a reasonably well-founded apprehension of impending danger, for purpose of escaping therefrom, may not in the contemplation of law constitute contributory negligence, though it may in fact have contributed to the production of the injury complained of.

Kelley v. Safeway Stores, Inc., 105 U.S. App. D. C. 406, 267 F.2d 683.

PROCEEDINGS BEFORE JUDGE CHARLES MCLAUGHLIN

* * * * *

3 THE COURT: this matter comes before the court on a motion by the defendant and response by the plaintiff. Counsel for defendant may proceed.

* * * * *

MR. CLARKE: It was produced in the way they were put out in my points and authorities. Basically, I have narrowed this down to three basic points and a fourth point that is not in the memorandum that I will bring up this morning.

* * * * *

9 I would also like to comment on one thing in reading the defendant's
opposition. He brings up the fact that I can't argue this motion now because
10 I didn't make a motion for a directed verdict at the close of all the evidence.
Well, I know that I did. I didn't make it at the usual time, but I had Miss
Warner write up the record on the day when you were addressing the jury
and we got to the point where the jury was still in the box and you had
already charged the jury and we were noting exceptions.

You had just heard from Mr. Collins and I am reading from page 104.
You got through ruling on his points and then you turned to me and I said,
"Your honor, I think . . ." I must have left out a word . . ." I think I had
better reserve a point for a directed verdict before the jury goes out without
arguing." I think I left out a word. You said, "The motion will be noted.
Anything else?"

So that motion was put in there and was noted and was reserved. Maybe
Mr. Collins didn't have all of the pages typed up when he had it typed. It
did appear back where we were taking exceptions.

Now I come to the fourth point, which was not particularly covered in my motion here. I am not a party that I think discriminates. I think I am fairly liberal that way, a lot more liberal than I know my parents were. I don't have any difficulty getting along with people but I came away from this courtroom feeling that this verdict was racially inspired. I haven't gotten that out of my mind yet.

- 11 I am distressed to bring it up. It is the first time I have ever brought it up, but I would be remiss in my duty if I didn't bring it up at this time. I guess the factor that called it to my attention as much as anything else was the note that the jury sent back to your honor.

If you will recall, we had 11 colored jurors and one white juror in this case. Plaintiff was a colored man and a very fine looking appearing man. My client was white. She came from the west side of Rock Creek Park. She sort of had an English accent, wore tweeds in court, and when that note went back to your honor I knew at that time that we had better read that thing into the record because I could see that something was going to happen.

You know, the way I read the Constitution when I took that course was that you were entitled to a jury of your peers. That certainly meant people who could read and write. That meant people on an equal plain with the plaintiff and the defendant and every indication was that those people could speak and write fluently.

- Well, when that note came back from that jury, that certainly did indicate that those people didn't speak or write correctly. I am going to read page 80 of this transcript of Miss Warner's, which is dated February 25, 1969, again to your honor, although maybe it is fresh in your memory. We got the note, discussed it back in your chambers and called Miss Warner in and read it in the
- 12 record and this is the court speaking: "The court has received from the jury the following note . . ." judge, your honor. "Is it proper for the jury to inquire of you in case we file for the plaintiff the maximum of liability?" and below that, "Jessie T. Smith," and, "Jessie T. Smith, Foreman."

That note came back — I don't have the time recorded — but that note couldn't help but ask, " 'Judge, how hard can we hit him?' " They weren't paying any attention to the instructions you gave about ordinary care, about notice, about dangerous conditions, invitee; they weren't paying any attention to the evidence that had been put into the picture — the testimony of the mailman and the other people.

There were 11 people up there and they were going to find in favor of that man and that note clearly says, " 'How hard can we hit him?' " There is no other way of looking at it. They wanted to know the maximum of liability.

I want to say this: I think you answered that note correctly and properly. I don't find any fault with that. You told them to return their verdict based upon the evidence and the instructions as to the law which the court has given you. That was very proper, but the pace had already been set at that time.

I hate to bring it up, but I am making this the fourth point in my argument because I haven't gotten it out of my mind since February when that
 13 note came back to you, I haven't gotten it out of my mind since those 11 people rendered that verdict that the verdict was racially inspired and I have nothing to go on except that note and my personal feeling and my personal feeling, I don't think, is based on any bias, prejudice, or anything else because, your honor, I have been hit before and as long as I am in this business I will continue to be hit, but I can truthfully say if this is the first case where I have been hit, I went away with that feeling and I would be remiss if I didn't open up my feeling at this time and let you know how I feel.

* * * * *

18 With reference to the judgment NOV, irrespective of what my brother said at bar, I did have the entire record typed and I am aware he did renew his motion for a directed verdict, but if we are going to play it by the rules of the Federal Rules of Civil Procedure we have to play by them strictly.

19 Our whole notion of federal procedure is not a tie into the old restrictions of common law pleading but there are rules that have to be followed. The rule here is that this motion for a directed verdict in order to support a motion for a judgment NOV has to be made at the conclusion of all of the evidence.

It is clear from this record, which I did have typed up, that that motion was not made at the conclusion of all the evidence. It came after the instructions to the jury and it came, in a word, at the wrong time. It is difficult for me to make comment on the fourth point that the counsel for the defendant raised.

I would be less than honest if I didn't say that I am sort of shocked that it was brought up in a courtroom in order that the record may be clear — and this is what counsel for defendant said in inference — I too am a southerner and although there was just one generation born in the south, we more or less tended to the problems of our ethnic background than the happenstance of our birth.

We live in a great country and things balance themselves out. I think I am sure sure that the jury met all the qualifications for jurors in the District of Columbia. I am sure that they were not influenced by matters of race,
 20 but by the evidence as it unfolded in this trial. I don't think I will make any more comment on the fourth point because at one time my people too were a minority people and those who are in the majority in this fair village or city were always making comments that we too were trying to gang together to reach conclusions in favor of our people when it is, if I might say, almost notorious that these particular people would be utterly fair in reaching any verdict dealing with their own people or their own brothers because I do think it is a fact of life that nowhere can you get more fairness than from people who were for a couple of centuries or many centuries, as was our case, a persecuted people. Thank you, your honor.

* * * * *

[Filed June 24, 1969]

ORDER

This matter having come before the Court on the written Motion of the Defendants for Judgment Notwithstanding the Verdict or in the Alternative for New Trial or Remittitur and its Memorandum of Points and Authorities in Support thereof and on the written Opposition of the Plaintiff to said Motion, and on the oral arguments of counsel for Defendants and Plaintiff in open court in support and opposition to Defendants' Motion, respectively, and the Court having fully considered the said Motion and the Opposition thereto and being fully advised in the premises, it is by the Court this 24th day of June, 1969:

ORDERED That the Motion of the Defendants for Judgment Notwithstanding the Verdict be and the same is hereby, granted.

/s/

Charles F. McLaughlin
Judge

[Filed June 24, 1969]

MEMORANDUM

This matter is before the Court on a Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial or Remittitur as the result of a jury verdict for the Plaintiff in the amount of \$25,000.00 in the above entitled proceeding.

The gravamen of the complaint at trial was that the Defendants negligently failed to furnish the Plaintiff with a safe receptacle for the deposit of mail and that this failure was the proximate cause of the injury to the Plaintiff's finger. Defendants deny the allegations of negligence stating that they had

no notice, actual or constructive, of any defective or dangerous condition existing within or about the mail receptacle.

The salient facts involved concerned an accident on February 20, 1964, which occurred at the home of the Defendants at 2506 Upton Street, N. W., in the District of Columbia, when the Plaintiff, a substitute mail carrier for the United States Post Office Department, was delivering mail through a mail slot in the front door of the Defendants' home. Specifically, the Plaintiff alleges that after he had inserted his right hand about three inches through the slot opening to deliver the mail and was clearing the slot to insure that the mail had completely dropped through, the metal flap stuck in a fixed raised position and then suddenly released striking the Plaintiff's finger; that surprised by the unexpected fall of the metal flap, he quickly withdrew his finger.¹

Testimony introduced described the mail slot in great detail as to dimensions and manner of operation.² There was further testimony that the word "papers" had been stamped on the slot and that without this inscription the slot "looked the same as others" used by homes on this particular mail route. In addition, it was shown that the "flap" opened inward when mail was pressed against it.³

¹ Plaintiff testified that he did not know whether the finger tip was cut off or whether it was pulled off although he did state that "I cut my finger off in the metal slot," when originally reporting the accident.

² There was testimony that the slot opening was seven inches wide; had a thickness of two and three-quarters inches in depth and centered approximately in the center of the Defendants' door; had a metal flap covering the backside of the slot opening which was seven to eight inches in vertical height and one-eighth inch in thickness and that in its normal position rested against the metal base of the slot.

³ In the course of the trial, Plaintiff proffered as evidence of the requisite standard of care Section 45.4 of the United States Postal Regulations which requires and specifies the mail receptacles to be provided by patrons of carrier-delivery service. Contained within that section are three diagrams depicting the minimum dimensions required in the construction of such a receptacle. One of the diagrams showing dimensions to be used "*when a hooded plate is used inside to provide greater privacy*" also shows the metal flap hinged on the outside of the mail slot and thus necessarily opening outward. Since the Defendants'

(Continued)

Although the Plaintiff, as a substitute mail carrier, had delivered mail through this slot on five or six prior occasions in the six to seven month period previous to the date of the accident, he had never encountered any difficulty with its operation. There was testimony by the regular mailman, who had serviced the route for some twenty years, that he too had never encountered any difficulty or trouble in the use of the slot. According to the testimony of the Plaintiff he was under instructions from his postal supervisor to report any dangerous mail receptacles. No such report was made regarding the mail receptacle of the Defendants nor had complaints of any nature been received about it. Similar testimony was given by the regular mailman who had also provided mail delivery service to the Defendants' residence without incident or complaint.

Defendants contend in this motion that the verdict returned by the jury is contrary to the law and the evidence adduced at trial in that the Plaintiff failed to prove notice to the Defendants of any unsafe condition or dangerous defect in the mail slot. In addition, the Defendants raised several other points which the Court need not reach in light of its determination on this threshold matter. However, it is first necessary to address a claim of procedural error by the Plaintiff as to the propriety of the Defendants' Motion for Judgment Notwithstanding the Verdict.

Under a claim of strict interpretation of the Federal Rules of Civil Procedure, the Plaintiff contends that the Defendants' motion for directed verdict at the close of all the evidence and subsequent to oral argument and the

(Footnote 3 Continued)

metal flap hinged on the inside and this opened to the inside, Plaintiff sought to introduce this regulation as evidence of non-compliance with the standard of care imposed upon the Defendants. However, the object of these regulations is not one of safety but of protection of mail from loss or theft. With the exception of the diagram describing the construction of a hooded plate mail receptacle, there is absolutely no suggestion as to which side of the slot opening the metal flap is to be hinged and the direction in which it should open. Moreover, use of a hooded mail receptacle is at the discretion of the patron and since such a receptacle was not in use in this instance and thus not at issue, the Court adheres to its previous ruling that the regulation was properly excluded.

Court's instructions to the jury, but before the case had been submitted to the jury for deliberation, was untimely filed. Neither the letter nor spirit of Rule 50 requires the strict construction urged upon the Court by the Plaintiff.⁴

There was no objection then and there is no claim now that the Plaintiff was prejudiced when the motion was renewed after the jury had been charged but before submission of the case to them. Hence, Defendants' subsequent motion for judgment notwithstanding the verdict suffers no infirmity and this motion is properly before the Court for consideration as to the sufficiency of the evidence. See *Martin v. Erie-Lackawanna Railroad Company*, 388 F.2d 802 (6 Cir. 1968)

It is the position of the Plaintiff that the Defendants, as landowners, failed to maintain a safe receptacle for the deposit of mail and as a result a defective condition arose which caused injury to the Plaintiff's finger the injury being the amputation of approximately one half inch of the tip of Plaintiff's right middle finger.⁵ Plaintiff asserts that the evidence fully supports this contention in that the testimony revealed that the door was old; that the mail flap was "unusually heavy" and spring operated; that the wooden area adjacent to the slot was rough and splintery; that the slot opened inward instead of outward; and that the Defendants never inspected nor oiled the hinge of the flap.

⁴ It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley v. Gibson*, 355 U.S. 41. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' 'Rule 1.' *Foman v. Davis*, 371 U.S. 178 (1962)

⁵ Plaintiff testified that approximately one half inch of the finger tip was cut off. Defendants characterized the amputated part of the finger as the fleshy tip of the finger. During trial the injured finger was covered by tape and the injured tip of the finger was never exposed. Other than the reference to the one half inch tip of the finger there was no testimony or evidence of injury to the bone, tendons, ligaments or other connecting tissue in the finger area.

In its consideration of this motion the Court has carefully reviewed the transcript of the pertinent testimony and can only conclude that the Plaintiff has failed to carry its burden to establish the negligence of the Defendants by a preponderance of the evidence. Not only is it the established law of this jurisdiction that a Plaintiff must prove sufficient facts to warrant an inference of negligence, but also to justify an inference that such negligence was proximately related to the injury. See *Martin v. United States*, 96 U.S. App. D.C. 264, 225 F.2d 945 (1955); *Pennsylvania Railroad Company v. Pomeroy*, 99 U.S. App. D.C. 272, 239 F.2d 435 (1956); *Liberty Mutual Insurance Company v. B. Frank Joy Company*, 297 F. Supp. 592 (D.C.D.C. 1968).

It is hornbook law that the mere happening of an accident is not evidence or proof of negligence; that the Plaintiff has the burden of proof that the Defendants were negligent and that this negligence was the proximate cause of the injury; that a jury is not permitted to speculate or guess; that conjecture, guess or suspicion do not amount to proof of negligence. *Collins v. District of Columbia*, 60 App. D.C. 100, 48 F.2d 1012 (1931). Moreover, in the instant case, it was incumbent upon the Plaintiff to prove that the Defendants had actual or constructive notice of the unsafe condition or defect which caused the injury to the Plaintiff's finger. *Martin v. United States*, *supra*; *National Bank of Washington v. Dixon*, 112 U.S. App. D.C. 183, 301 F.2d 507 (1961); *Dommel v. Managers, Inc.*, 109 U.S. App. D.C. 370, 288 F.2d 154 (1961); *Newman v. United States*, 248 F. Supp. 669 (D.C.D.C. 1965). See *Whetzel v. Jess Fisher Management Co.*, 108 U.S. App. D.C. 385, 282 F.2d 943 (1960).

Plaintiff made no claim of any actual notice but relied upon a claim of constructive notice, that is, that a dangerous situation had existed for such a length of time that, had the Defendants exercised reasonable supervision and inspection of their premises, they would have known of the existence of a defect in the mail slot. Admittedly, the Defendants neither oiled nor inspected the mail flap. However, the record is barren of any evidence indicating that such an inspection would have uncovered any dangerous defect or

condition in the mail slot or flap which in turn would have caused the accident. *Centruy Indemnity Company v. Arnold*, 193 F.2d 531, cert. denied 328 U.S. 854 (1946). Evidence of any imperfection which would have caused the mail flap to fall with such force as to sever the Plaintiff's finger is not discernible herein. Indeed the record is absent any evidence or testimony revealing any specific defect or condition which could be labeled the proximate cause of this accident.⁶

Testimony as to the antique nature and history of the door appears to be of no probative value on the issue of negligence since the finger was injured in the mail slot which was separately installed in the door. Testimony as to the dimensions of the mail slot and the manner in which it operated do not in themselves support a finding of negligence nor can the fact the stamped inscription "Papers" appeared on the flap sustain such a finding. Plaintiff has described the mail flap as "unusually heavy" yet the Court can find no testimony or evidence in the record to this effect. To the contrary there is testimony of the Plaintiff himself that with the exception of the inscription "Papers" the mail slot looked the same as and was similar to hundreds of others to which he had delivered mail.

⁶ Substantial testimony was introduced into the record regarding the general condition of the Defendants' door and mail slot but there was no evidence which would permit a legitimate inference that any of these conditions was the proximate and specific cause of the accident. Rather the evidence proffered was a listing of the general conditions and characteristics of the door and slot. In *Monahan v. Montgomery*, 216 A.2d 824 (Conn. 1966), a state court addressing a similar question held:

"... That the notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely the conditions naturally productive of that defect even though subsequently in fact producing it. On a question of notice, the trier's consideration must be confined to the defendant's knowledge and realization of the specific condition causing the injury, and such knowledge and realization cannot be found to exist from a knowledge of the general or overall conditions obtaining on the premises."

While the mail slot had been in continuous service over twenty years prior to the accident there had never been any difficulty in its use. The Plaintiff himself had used it on several occasions previous to the accident without any trouble. Moreover, he testified that he was required to report dangerous mail receptacles to his supervisor but had never made such a report concerning the mail slot in question. There was further testimony that shortly after the accident a postal official visited the Defendants' home for purposes of inspecting the mail slot and that the report therein was negative as to the existence of defects or dangerous conditions.

Considering all the evidence in the light most favorable to the Plaintiff, the Court concludes that there is an absence of proof of any negligence on the part of the Defendants or of the existence of conditions so obviously hazardous as to amount to evidence from which any inference of negligence would legitimately arise. The Court concludes, further, that the entire record fails to establish that the Defendants knew or that in the exercise of reasonable care and caution, should have known of any hazardous condition which could have been discovered by a proper and reasonable inspection.

To summarize, the Plaintiff not only failed to prove notice to the Defendants of an unsafe condition in the mail slot, but the evidence adduced at trial is wholly insufficient to establish that an unsafe condition or dangerous defect existed which can reasonably be held to be the proximate cause of the injury to the Plaintiff's finger.

Premises considered, it is to be the order of this Court that the Motion of the Defendants for Judgment Notwithstanding the Verdict be granted.

/s/ CHARLES F. MCCLAUGHLIN
Judge

June 23, 1969.

[Filed July 1, 1969]

O R D E R

It is hereby Ordered that the last paragraph of the Memorandum entered in the above entitled action, dated June 23, 1969, be amended as follows: At the end of said paragraph the following is added:

"... and that the Motion of the Defendants in the Alternative for New Trial or Remittitur be denied;"

and that the said paragraph as amended be and become a part of said Memorandum and that the entire paragraph as amended now read as follows:

"Premises considered, it is to be the order of this Court that the Motion of the Defendants for Judgment Notwithstanding the Verdict be granted, and the Motion of the Defendants in the Alternative for New Trial or Remittitur be denied."

/s/ CHARLES F. McLAUGHLIN
Judge

July 1, 1969

[Filed July 1, 1969]

O R D E R

It is hereby Ordered that the last paragraph of the Order entered in the above entitled action, dated June 24, 1969 be amended as follows: At the end of said paragraph the following is added:

"... and that the Motion of the Defendants in the Alternative for New Trial or Remittitur be and the same is, hereby, denied;"

and that the said paragraph as amended be and become a part of said Order and that the entire paragraph as amended now read as follows:

"ORDERED That the Motion of the Defendants for Judgment Notwithstanding the Verdict be and the same is, hereby, granted and that the Motion of the Defendants in the Alternative for New Trial or Remittitur be and the same is, hereby, denied."

/s/ CHARLES F. MCLAUGHLIN
Judge

July 1, 1969

[Filed July 24, 1969]

NOTICE OF APPEAL

Notice is hereby given that Jerome W. Lofty, Plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Order of the United States District Court for the District of Columbia, granting the Motion of the Defendants for Judgment Notwithstanding the Verdict entered in this action on the 24th day of June, 1969, as amended by the Order of the United States District Court for the District of Columbia, in which amendatory Order the Motion of the Defendants for Judgment Notwithstanding the Verdict was granted and the Motion of the Defendants in the Alternative for New Trial or Remittitur was denied and was entered in this action on the 1st day of July, 1969.

/s/ PHILIP R. COLLINS
PHILIP R. COLLINS
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: 296-5494
Attorney for Jerome W. Lofty,
Plaintiff

July 22, 1969

[Certificate of Service]

744

No. 23,516

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JEROME W. LOFTY,

Appellant,

v.

RUTH COLEMAN MARTHINSON
EXECUTRIX OF THE ESTATE OF
DETLOW M. MARTHINSON

and

RUTH COLEMAN MARTHINSON,

Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 9 1970

Nathan J. Paulson
CLERK

PHILIP R. COLLINS
URBAN A. LESTER

1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Appellant

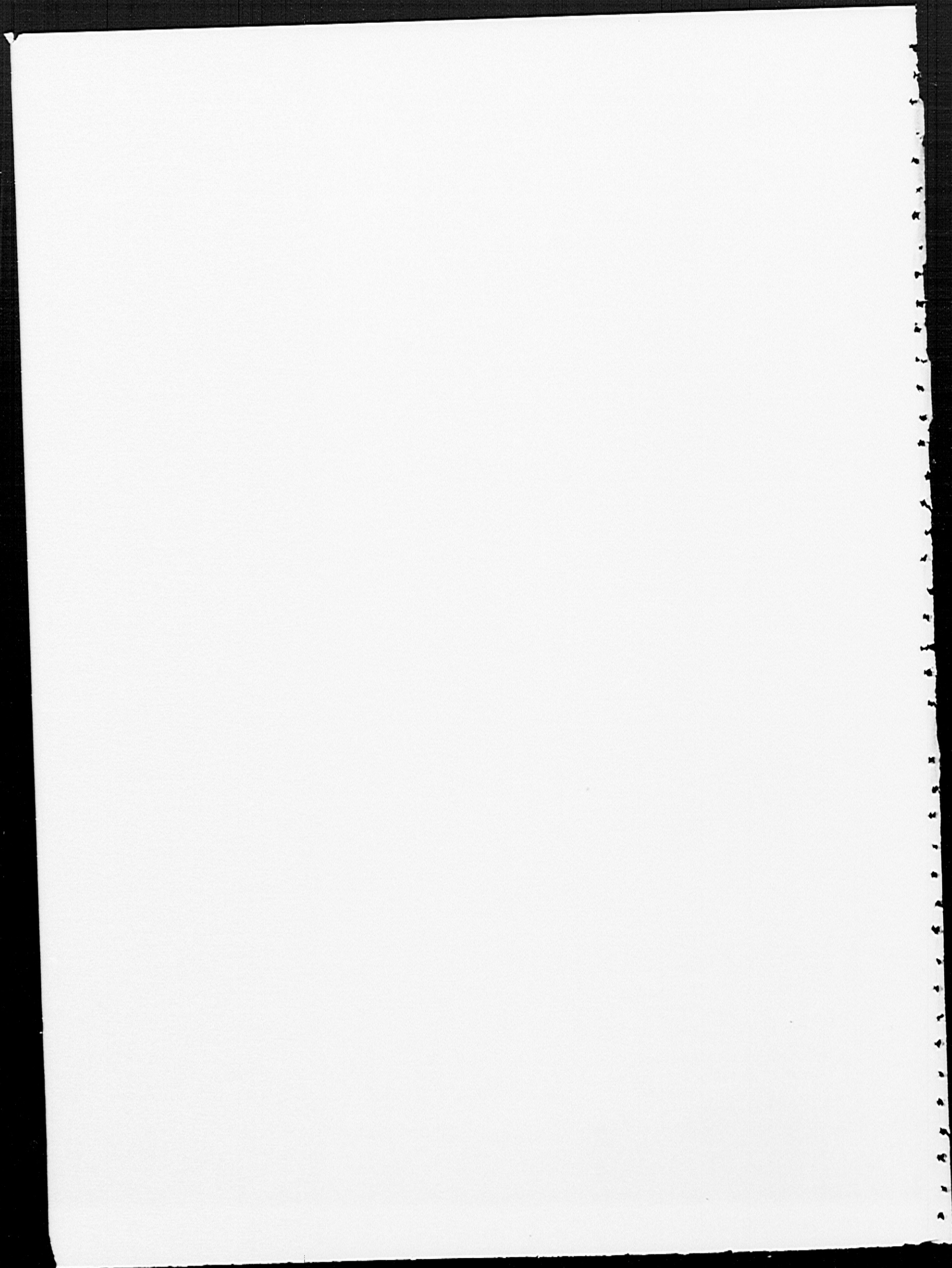


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* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JEROME W. LOFTY,

Appellant.

v.

RUTH COLEMAN MARTHINSON
EXECUTRIX OF THE ESTATE OF
DETLOW M. MARTHINSON

and

RUTH COLEMAN MARTHINSON,

Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED

I. Whether the court below erred in granting appellees' motion for judgment notwithstanding the verdict where appellees failed to renew their motion for directed verdict at the close of all the evidence and prior to the court's charge to the jury?

II. Whether the court below erred in granting appellee's motion for judgment notwithstanding the verdict in the light of all the evidence?

III. Whether the court below erred in prohibiting appellant from introducing into evidence and presenting to the jury relevant postal regulations governing mail receptacles?

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment and order granting appellees' motion for judgment notwithstanding the verdict by the United States District Court for the District of Columbia, entered on the 24th day of June, 1969 and amended on the 1st day of July, 1969. (App. 97, 104).

REFERENCES TO RULINGS

The United States District Court for the District of Columbia filed a Memorandum in support of its Order, dated June 24, 1969, as amended by its Order of July 1, 1969. (App. 97-103, 104).

STATEMENT OF THE CASE

The appellant, Jerome Lofty, was at the time of the accident and is now a mailman, or to use a more specific "postal service" title, he is a mail carrier. He is an employee of the Post Office Department in its Postal Service and works in the Washington Metropolitan Area. In 1964, he was a substitute mail carrier, having passed an examination for this position. He was working on February 28, 1964 out of the Cleveland Park Station of the Washington City Post Office, which is located at 3430 Connecticut Avenue, Northwest in the District of Columbia. He is a native born Washingtonian. He was educated in the public schools of the District of Columbia and has completed approximately two years of college at Howard University (App. 6).

As a substitute carrier, assigned to the Cleveland Park Branch of the Washington City Post Office, appellant would take over the route of a regular carrier when the regular carrier was on sick or annual leave. On February 28,

1964, he took over the route of one Mike Simone, a regular carrier. This was Route 843 of the Cleveland Park Station. It was the only "mounted" route (viz. a truck was utilized) in the area served by the Cleveland Park Station and it encompassed an area delineated as follows: Rock Creek Park near Massachusetts Avenue and 32nd Street to 44th Street, Rock Creek Park and Military Road, all in the Northwest Section of the District of Columbia (App. 7).

The route specifically encompassed a single family dwelling, located at 2506 Upton Street, Northwest and owned and occupied by Detlow M. Marthinson and his wife, Mrs. Ruth Coleman Marthinson.¹ (App. 1-2, 4).

In the course of delivering mail to the home of the appellees on February 28, 1964, the appellant was required to insert the mail thru a metal slot in the front door of 2506 Upton Street, Northwest. This metal slot was equipped on its posterior surface with a heavy metal flap. The flap was designed in such a way that it opened away from the opening of the mail slot. In addition, the metal flap was hinged at the top so that its lower surface and edge engaged the lower lip of the metal mail slot. There was extensive testimony at the trial of this case as to the mail receptacle, its dimensions and manner of operation, particularly as to the heavy flap which opened inward and was spring loaded (App. 7-8, 11-13).

Appellant enfolded the mail for this house in one magazine, also being delivered on the day in question, and proceeded to push the mail thru the opening-inward mail slot. Appellant was required in accordance with instructions from his superiors of the Postal Service to make certain that the mail had cleared the door mail slot and this required his having his hand and fingers partially in the mail slot. In the process of withdrawing his hand and

¹ Mr. Marthinson died after the commencement of this cause of action in the United States District Court for the District of Columbia and Mrs. Marthinson, as Executrix of the Estate of Detlow M. Marthinson, and in her capacity as surviving Joint Tenant of the premises, 2506 Upton Street, Northwest, are the appellees herein and will be so referred to hereinafter.

fingers from the slot, the said mail slot, which had previously stuck upward, suddenly closed down upon the fingers of the appellant's right hand, resulting in the severance of a portion of the appellant's finger (right middle distal phalanx). (App. 8.)

Appellant alleged that the appellees had negligently maintained and allowed to exist a mail slot and flap which operated in a dangerous manner and made it unsafe and a trap for postmen, such as the appellant (App. 2). The appellee, Ruth Coleman Marthinson, testified under cross-examination as to the advanced age of the door. She testified that while the house at 2506 Upton Street, Northwest, was built under her husband's aegis in 1949, the door, in which the mail receptacle was located, was not a new door, bought from a lumber supply company in 1949 to be placed in the frame of this doorway in this then new house, but was rather "an old door," one of a set of "double doors" which came "from the house of Judge Payne at the corner of 16th and I" Streets, Northwest, bought by the appellees "when the house [of Judge Payne] was remodeled by Mr. Horace Peasley." (App. 57-58.) When asked if the mail slot "was purchased new," appellee, Ruth Coleman Marthinson replied: "All I am going to say is we had double doors when I bought it, and the other door has no slot in it, and I am quite sure this one was put in at the time it [the door] was built." (App. 57.)

As a result of the incident occurring at the appellees' home on February 28, 1964, the appellant lost a portion of the front end of the middle finger of his right hand.

At the close of the appellant's case in chief, appellees made a motion for a directed verdict on two grounds: (1) there has been no duty shown to exist and (2) there has been no breach of any duty (App. 44-45). Such motion was overruled by the court (App. 46-47).

At the close of the appellees' case or stated in another way at the close of all the evidence, no motion was made by the appellees, but rather the

case proceeded with argument by counsel and the instructions of the court to the jury. Just prior to the jury leaving the courtroom, counsel for appellees stated: "Your honor, I think I had better reserve the motion for directed verdict before the jury goes out without arguing" (App. 66-67).

The jury returned with a verdict for the plaintiff in the amount of \$25,000.00 (R. 68). Subsequently, appellees made a motion for judgment notwithstanding the verdict, or in the alternative for a new trial or remittitur (App. 69-70). The court below denied the motion for new trial or remittitur and granted the motion for judgment notwithstanding the verdict, which gave rise to this appeal (App. 97, 104-105).

- I. THE COURT BELOW ERRED IN GRANTING APPELLEES' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE APPELLEES FAILED TO RENEW THEIR MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE AND PRIOR TO THE COURT'S CHARGE TO THE JURY.

The court below erred in granting appellees' motion for judgment notwithstanding the verdict where appellees failed to renew their motion for a directed verdict at the close of all the evidence and prior to the court's charge to the jury.

A related procedural problem was met by the Sixth Circuit Court of Appeals in the case of *Martin v. Erie-Lackawanna Railroad Company*, 388 F.2d 802 (6th Cir., 1968). This case involved an action by a railroad passenger and her husband for damages sustained by the passenger on the defendant's property when she was knocked to the ground as an abortive purse-snatching attempt failed. The relevant procedural issue was dismissed and disposed of by the court in the following language:

. . . Defendant moved at the close of plaintiffs' evidence for a directed verdict based upon the insufficiency of the evidence concerning the likelihood of the assault which occurred. At the close of all the evidence and subsequent

to the oral argument but prior to the court's charge to the jury, defendant renewed its motion. While plaintiffs' counsel conceded at oral argument before this court that the District Judge overruled this motion on the merits, he also claims that the motion was untimely under Rule 50, F.R. Civ. P. We believe the District Court properly entertained the motion as seasonably made, neither the letter nor spirit of Rule 50 requiring the strict construction urged by plaintiffs:

"Rule 50 provides for a motion for a directed verdict at the close of the plaintiff's evidence or at the close of the evidence *and before the case is submitted to the jury*. It enables the court to determine whether there is any question of fact to be submitted to the jury and whether any verdict other than the one directed would be erroneous as a matter of law. It is conceived as a device to save the time and trouble involved in a lengthy jury determination." 2 Barron & Holtzoff §1071 (Wright ed. 1961). (Emphasis added.)

Plaintiffs do not claim that they were prejudiced by the fact that the motion for directed verdict was renewed subsequent to oral argument rather than prior thereto. See Rules 1 and 61, F.R.Civ.P. It follows that defendant's subsequent motion for judgment notwithstanding the verdict suffers no infirmity and that the sufficiency of the evidence may properly be reviewed on this appeal.

(At pages 804-805.)

The distinction between the procedural situation in the *Martin* case and the procedural situation here illustrates the error of the appellees in their failure to move at the close of all the evidence for a directed verdict. In the *Martin* case, the defendant moved for a directed verdict "at the close of all the evidence and subsequent to oral argument but prior to the court's charge to the jury." In the instant case, as the record clearly shows, oral arguments by both the appellant and appellee had been concluded and the court had

charged the jury before counsel for appellee stated: "Your Honor, I think I better reserve the motion for a directed verdict before the jury goes out without arguing" (App. 67).

See also *Jack Cole & Company v. Hudson*, 409 F.2d 188, 191 (5th Cir., 1969), where although counsel for defendant failed to move for a directed verdict at the close of all the evidence, he did "make a request in chambers [prior to the trial judge's commencement of his instructions to the jury] that the jury be instructed to find for them," which again emphasizes the procedural situation in this appeal.

Thus, it is submitted that there was a clear failure to comply with the procedural requirements necessary to preserve the right of the appellees to make a motion for judgment notwithstanding the verdict.

II. THE COURT ERRED IN GRANTING APPELLEES' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT IN THE LIGHT OF ALL THE EVIDENCE.

The principle has been well established in judicial interpretations of Section 50(a) and (b) that a court may not substitute its judgment on questions of fact for the judgment of the jury by directing a verdict or granting a motion for judgment notwithstanding the verdict because the evidence decidedly preponderates for the movant. *Swearingen v. Sears Roebuck & Company*, 376 F.2d 637, 639 (10th Cir., 1967). In *O'Neil v. W. R. Grace & Company*, 410 F.2d 908, 911 (5th Cir., 1969), the United States Court of Appeals for the Fifth Circuit succinctly stated this principle in the following language:

The standard to be followed in ruling upon a motion for judgment notwithstanding the verdict is the same as that to be followed regarding a motion for directed verdict; indeed, a judgment notwithstanding the verdict technically is a "judgment entered in accordance with * * * [the] motion for directed verdict." Fed. R.Civ.P. 50(b). A

judgment notwithstanding the verdict should not be granted unless the evidence, together with all inferences that can reasonably be drawn therefrom, is so one-sided that reasonable men could not disagree on the verdict. See *Ricketson v. Seaboard Airline R. R. Co.*, 403 F.2d 826, 840 (5th Cir., 1968). (*Emphasis supplied.*)

Another court of appeals went even further when it stated that "the Court, however, has no right to enter a verdict on its own, even though a prevailing party's position or story may well have seemed *incredible . . .*" *Compton v. United States*, 377 F.2d 408, 412 (8th Cir., 1967). (*Emphasis supplied.*)

Throughout the last paragraphs of his Memorandum Opinion in support of the Order and Amended Order granting the Motion for Judgment Notwithstanding the Verdict, the District Judge negatively reappraised the facts of this case, on which the jury based its verdict (App. 97-103, 104). He appraised the facts anew and concluded that there was no evidence of any dangerous defect or condition in the mail slot which would have caused it to fall "with such force as to sever the Plaintiff's finger" (App. 102), while admitting that the mail flap was never oiled or inspected by the appellees (App. 101), but undoubtedly forgetting the appellant's testimony that the flap stuck and as he was taking his hand out of the slot, the spring-loaded flap suddenly closed on his finger, thereby amputating a portion of it (App. 8). The jury apparently heard and understood the description of exactly what took place when it was testified to by the plaintiff, the only one who could describe exactly what happened.

The facts as to "the antique nature and history" of the front door of appellees' home, in which the slot is located, appears to the District Judge "to be of no probative value" since he concludes that the mail slot was "separately installed in the door" (App. 102). Actually, a review of the record more adequately sustains the inference, which it is submitted the jury drew, that the door slot and flap were in the door when the door was built and that both the door and the mail receptacle were of an antique nature. Note particularly the following testimony of appellee, Ruth Coleman Marthinson:

Q. Do you happen to know whether or not this door was purchased new? A. It is an old door.

Q. It is an old door? A. Yes.

Q. I wonder if you could tell us where the old door came from? A. Yes, I could.

Q. Where did it come from? A. From the house of Judge Payne at the corner of 16th and I.

Q. When was the Judge Payne house built? A. I don't know, but I have the duplicate of this.

Q. Would you say the door was 75 years old? A. I don't know the history of it.

Q. *Is it the same slot that was in the door?* A. *No, that was not in the door.*

Q. *That was purchased new?* A. *All I am going to say is we had double doors when I bought it, and the other door has no slot in it, and I am quite sure this one was put in at the time it was built. [It could only reasonably refer to the door.] (Emphasis supplied.) (App. 57).*

Cf. Q. It is your best recollection that this door had the mail slot put into it after you obtained the door? A. That is my impression.

Q. But you are not certain, however? A. I am not certain. (App. 58).

It is, of course, axiomatic that it is for the trier of facts, the jury in this instance, to evaluate the testimony given in the light of all the circumstances surrounding its submission, including the candor and directness of a witness.

The essential error of the court in granting the judgment notwithstanding the verdict is highlighted by the failure to apply the foregoing principle to the pivotal testimony quoted above. It is quite clear further that the appellees recognized no duty to inspect the antique door or to take any measure for its maintenance and repair. Thus, it was admitted that the door mail receptacle was never inspected by the homeowners nor were its hinges or spring oiled.

It is quite clear that a jury, aided with the benefit of their common, collective experience, could conclude that a spring of an antique nature, which is not oiled regularly, is subject to corrosion and thus, such corrosion could reasonably cause the spring to stick. The same is true of antique hinges.

In regard to the antique nature of the door and the mail receptacle, the jury could well have concluded that this was in fact an old door and an old mail receptacle. In the light of their collective experience and knowledge, they may well have remembered that in various neighborhoods in Washington, District of Columbia there are houses over 75 years old which have double front doors and in one of said two doors the mail receptacle is located, which is of the same vintage as the door and on the same side or door of the double doors as the door used as a front door to their home by the appellees. One further point on the age of the mail receptacle, — the jury could well have concluded that the word, "Papers," on the heavy mail receptacle flap meant to them that this was an antique receptacle in an antique door, for today in the realm of their respective experiences, they do not see this English form of inscription, "Papers," on the door slot, but rather the word, "Mail." Further the findings of fact that there has never been any difficulty in the use of the mail slot in the past, the appellant having used the mail slot in the past without incident and the slot having been superficially inspected by a postal supervisor after the incident by the District Judge enabled him to conclude that there was, *inter alia*, "an absence of the existence of conditions so obviously hazardous as to amount to evidence from which any inference of negligence would legitimately arise" (App. 103). To reach this conclusion, the District Judge substituted his judgment on questions of fact, particularly as to the antique nature of the mail receptacle and the duties imposed upon the persons who maintain it, for the judgment of the jury and in so doing, he committed error.

The jury, once having determined that the appellees chose to utilize an antique mail receptacle and having determined that no effort was made to inspect and maintain it, could rightfully conclude that there was a direct, causal

relation between such actions and inactions and the sudden malfunction and failure of the antique mail receptacle with the consequent injury to the appellant.

III. THE COURT ERRED IN PROHIBITING APPELLANT FROM INTRODUCING INTO EVIDENCE AND PRESENTING TO THE JURY RELEVANT POSTAL REGULATIONS GOVERNING MAIL RECEPTACLES.

The appellant at trial attempted to introduce into evidence the pertinent section of the Regulations of the Post Office Department, dealing with mail receptacles, which is to be found in the Addendum to this brief and is referred to as Title 39, Section 45.4 of the Code of Federal Regulations (see Addendum). This Section has been renumbered Section 155.4 in a renumbering of this title of the Code of Federal Regulations, which occurred *circa* 1966. There is a requirement in these Regulations, *inter alia*, for a mail slot opening outward and not inward as was true of the old mail slot in the old door in this case (App. 32-42).

The Court concluded that the postal regulation was not "pertinent to the issues of this case and shouldn't be received and if this case is submitted to a jury, it is submitted on the question of whether or not the defendant was negligent under the principles of common law negligence" (App. 42).

After the District Judge refused to admit into evidence the pertinent postal regulations, counsel for appellant made an offer of proof, which portrayed the manner in which the proposed witness, Mr. Lee L. Hulick, Assistant Director of the Delivery Division, Bureau of Operations of the Post Office Department would testify concerning these regulations. In his offer of proof, the appellant showed that in addition to testifying as to his expert knowledge in the field of postal regulations, the witness would discuss the purpose and policy in back of these regulations, which included the protection of the mail, the safety of the mail, the convenience of the postman and last but not least the safety of the postman. He would show in detail by his testimony that "the regulations had as their purpose the convenience and *safety* of the mail-

man as specifically evidenced by such factors as the height of the midline point of the mail slot opening by a trap 30 inches above the floor, *as well as the fact that the mail slot would open only outward*" (App. 43). He would "further testify to his knowledge that the Post Office Department does not have any regulation in existence which would permit a mail slot with an inside flap." (App. 42-43.) (*Emphasis supplied.*)

Klein v. District of Columbia, ____ U.S. App. D.C. ____, 409 F.2d 164, 166-169 (D.C. Cir., 1969) and *Curtis v. District of Columbia*, 124 U.S. App. D.C. 241, 363 F.2d 973 (D.C. Cir., 1966) were sidewalk cases involving the plaintiffs tripping respectively over a protruding handle on a sidewalk elevator shaft door and over a vault hinge protruding approximately one inch above the sidewalk. In both cases, counsel for the plaintiff attempted to introduce "virtually identical" sections of the District of Columbia Building Code, but the judges in each case "excluded" this evidence. The pertinent sections of the District of Columbia Building Code did not apply to the sidewalk items at issue in both cases since "the code became effective after the hinge was built." In *Curtis*, the court held that since the section of the Building Code did not apply to the hinge "it could not have been used as evidence of *per se* negligence." After the denial of the introduction of this government regulation into evidence, in *Curtis*, the jury found for the defendant, whereas in *Klein*, the court directed a verdict for the defendant.

This Court reversed in both cases, determining that "the building code was an important piece of evidence as a reasonable standard of care in maintaining sidewalks in a safe condition." *Klein v. District of Columbia, Ibid.*, at pp. 166-167. The key language in reaching this conclusion, which is from *Curtis*, but quoted *in toto* in *Klein* is the following:

The foregoing [the code's inapplicability to previously built hinges] does not end the problem; for the regulation, though not violated, *was evidence of a standard which the jury could consider in determining whether the defendants*

had exercised due care according to their respective responsibilities. The regulation should have been admitted accompanied with an instruction, if requested, that it could be considered with other evidence but only for the limited purpose we indicate. Experience and expertise had combined to lead the Commissioners to decide in formulating the 1951 Building Code that safety would be served by requiring vault coverage in sidewalks to be flush with the sidewalk paving. This action of the responsible public authorities is relevant in determining the common law standard of care to be observed by defendants for the safety of pedestrians. * * * *Curtis v. District of Columbia*, 124 U.S. App. D.C. 241, 243, 363 F.2d 973, 976 (D.C. Cir., 1966). *Ibid.*

As in the *Klein* and *Curtis* cases, discussed above, so in this case, the hallmark of the postal regulation is safety and safety for the postal carrier, who delivers the mail thru the conduit of the mail receptacle. Just as in the above cases, the regulation of the District of Columbia, the section of its Building Code, should have been admitted by the respective District Judges not to show negligence *per se* but to portray rather a reasonable standard of care, so in this case, the District Judge should have admitted the Postal Regulations, irrespective of whether the argument or defense of retroactivity might not have been met here, into evidence to show the reasonable standard of care owed by the appellees in maintaining the old mail receptacle in the old front door at their home.

Accordingly, the District Judge erred in prohibiting the appellant from introducing into evidence and presenting to the jury the Postal Regulations, contained in the Code of Federal Regulations, Title 39, Section 45.4, governing mail receptacles.

CONCLUSION

For all of the above reasons, the action of the court below in granting the Motion for Judgment Notwithstanding the Verdict of the Appellees should be reversed.

Respectfully submitted,

PHILIP R. COLLINS

URBAN A. LESTER

1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Appellant

February 9, 1970.

Parcel post mail for patrons within the city delivery limits receive mail through rented boxes delivered to a designated street by carrier upon written request.

- Establishing city delivery.
- Extension of city delivery.
- Submission of petitions.
- Mail receptacles.
- Out-of-bounds patrons.
- Apartment house receptacles.

1 Establishing city delivery.

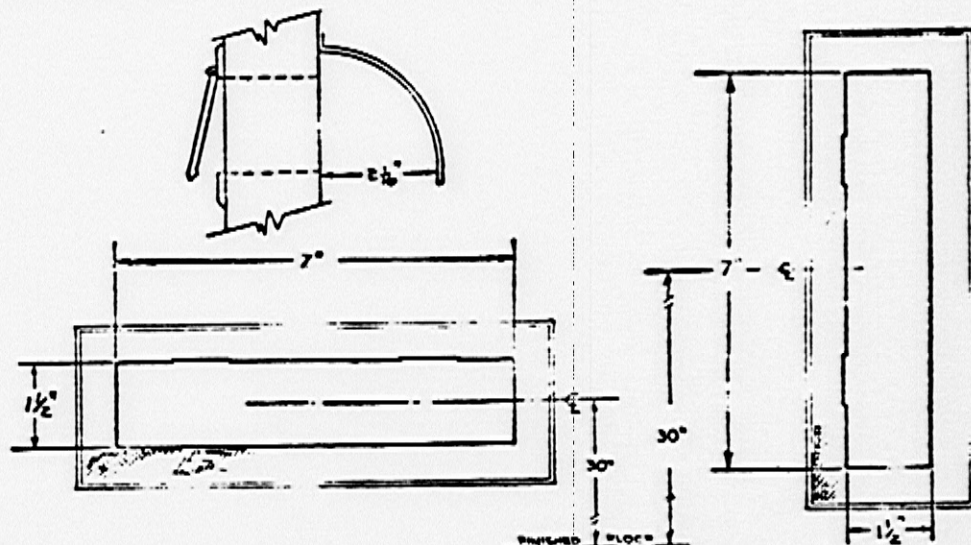
When two or more building lots are the grounds of one residence, it may be regarded as improved. All other requirements are met. Regarding sidewalks is waived if suitable walks from streets to the house. Walks of any material, including gravel and cinders, that render them passable throughout the year are accept-

Extend existing city delivery service to carrier to new areas, 50 percent proposed new area must be improved with houses, and meet the other requirements for establishment of city service. These requirements do not apply to the same extent to delivery by private city carrier.

Requests or petitions to establish, change, or extend city delivery service should be made to the local postmaster. Formal petition is required.

a) Obligation of patron. Patrons of carrier-delivery service must provide

(b) **Door slot specifications.** The clear rectangular opening in the outside slot plate must be at least 1½ inches wide, and 7 inches long. The slot must have a flap, hinged at the top if placed horizon-



Patrons located outside city-delivery limits may be given delivery service if they erect boxes on the carrier's regular line of travel. Special delivery, parcel post, insured, COD, and registered mail will be delivered to the residences of out-of-bounds patrons, if the residences are not more than three blocks from the carrier's line of travel, and provided walks have been constructed or the street is not impassable; otherwise a notice will be left in the box requesting that the patron call for the mail. If an ordinary parcel is involved and it can be placed in the box, delivery will be made in that manner.

(a) *Conditions requiring installation of receptacles.* (1) The delivery of mail in apartment houses, family hotels, residential flats, and business flats in residential areas, containing three or more apartments having a common street entrance, shall be contingent on the installation and maintenance of United States Post Office approved mail receptacles, one for each apartment, including resident manager and janitor, unless the management has arranged for the mail to be delivered at the office or desk for distribution by its employees. The cost of receptacles and their installation are paid for by the owner of the building.

(2) Owners and managers of apartment houses, family hotels, and flats, equipped with old-type apartment house mail receptacles are urged to install up-to-date and approved receptacles to assure more adequate protection to the

tally, and hinge the side away from the hinge side of the door if placed vertically. When a hood plate is used inside to provide greater privacy, the bottom line of the hooded portion must not be more than $\frac{3}{4}$ inch below the bottom line of the slot in the outside plate, if placed horizontally, or more than $\frac{3}{4}$ inch beyond the side line of the slot in the outside plate near the hinge edge of the door if placed vertically. The hood at its greatest projection must not be less than 2 inches beyond the inside face of the door. Door slots must be placed not less than 30 inches above the finish floor line.

mail occupants. When these buildings are remodeled to provide additional apartments or when a material change in the location of boxes is made, they shall be equipped with approved receptacles.

(3) When new apartments are being erected or existing ones are remodelled, postmasters will inform builders and owners of the requirements of this section and will provide for a suitable inspection to see that receptacles of safe and durable construction are installed in conformity with this section.

(b) *Specifications for construction of receptacles*—(1) *Materials*—The receptacles shall be manufactured of material of such strength and thickness as to provide reasonable safety to the mail deposited.

(2) *Capacity.* Both horizontal and vertical-type racks must be of sufficient capacity to receive long-mail 4½ inches in width and contain large and bulky magazines, unrolled as well as rolled, and must be so constructed and of such height or length and capacity that magazines 14 inches in length and 2½ inches in diameter, if rolled, may be deposited and removed with facility.

(3) *Individual doors and locks.* (i) Each individual receptacle must be equipped with a door through which the mail may be removed by the tenant. The doors of the several receptacles shall be secured by key locks or combination keyless locks. If key locks are installed, manufacturers must provide a sufficient number of key changes to prevent the opening of receptacles by the use of a

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23,516

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Appellant,

v.

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EXECUTRIX OF THE ESTATE OF
DETLOW M. MARTINSON
AND
RUTH COLEMAN MARTHINSON,

Appellees,

*Appeal from the United States District Court
for the District of Columbia*

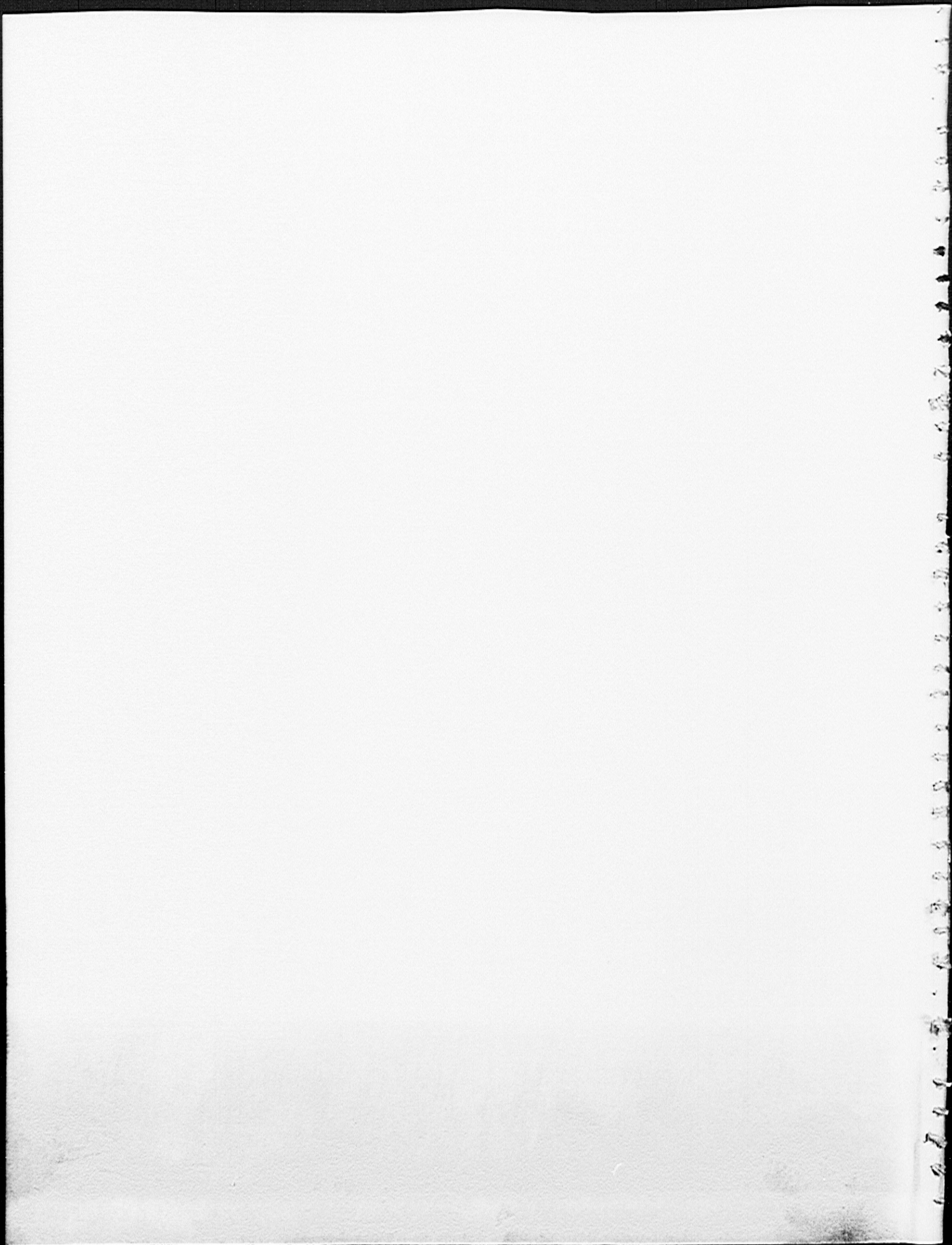
BRIEF FOR APPELLEES

United States Court of Appeals
For the District of Columbia Circuit

FILED APR 3 1970

Nathan F. Coleman
CLERK

William H. Clarke
Gallner, Stewart & Clarke
1215 Nineteenth Street, N.W.
Washington, D.C. 20036
Counsel for Appellees



(i)

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*Appeal from the United States District Court
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BRIEF FOR APPELLEES

STATEMENT OF ISSUES PRESENTED

I. Whether the lower court erred in determining that the Appellees' Motion for a Direct Verdict made at the close of all the evidence and subsequent to the court's instructions to the jury, but before the case had been submitted to the jury for deliberation, was timely filed?

II. Whether lower court erred in granting the Appellees' Motion for a Judgement Notwithstanding the Verdict on the basis that

the Appellant failed to show negligence on the part of the Appellees and the Appellant's failure to prove notice of any unsafe condition or dangerous defect?

III. Whether the lower court erred in prohibiting Appellant from introducing into evidence the postal regulations governing mail receptacles?

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment and order granting Appellees' Motion for Judgment Notwithstanding the Verdict by the United States District Court for the District of Columbia, entered on the 24th day of June, 1969 and amended on the 1st day of July, 1969 (App. 97, 104).

REFERENCES TO RULINGS

The United States District Court for the District of Columbia filed a Memorandum in support of its Order, dated June 24, 1969, as amended by its Order of July 1, 1969 (App. 97-103, 104).

COUNTERSTATEMENT OF THE CASE

The Appellant, Jerome Lofty, was at the time of the accident and is now a mail carrier. He is an employee of the Post Office Department in its Postal Service and works in the Washington Metropolitan Area. In 1964, he was a substitute mail carrier. He was working on February 28, 1964 out of the Cleveland Park Station of the Washington City Post Office (App. 6).

As a substitute carrier assigned to the Cleveland Park Branch of the Washington City Post Office, the Appellant would take over the route of a regular carrier when the regular carrier was on sick or annual leave. On February 28, 1964, he took over the route of one Mike Simone, a regular carrier. This was Route 843 of the Cleveland Park Station. One of the houses on this route was located at 2506 Upton Street, N. W. and was owned and occupied by Det-

low M. Marthinson and his wife, Mrs. Ruth Coleman Marthinson¹ (App. 1-2, 4).

While delivering mail to the home of the Appellees on February 28, 1964, the Appellant inserted the mail through a metal slot in the front door of the Appellees' house. The mail slot was seven inches long and approximately two inches high. The mail slot had a metal flap on its posterior surface and was equipped with a coil spring. The metal flap was hinged at the top. The Appellant testified that with the exception of an inscription on the mail slot, it looked the same as, and was similar to, hundreds of others to which he had delivered mail. The Appellant himself had delivered mail through this mail slot approximately five or six times prior to the delivery on February 28, 1964. Although postal regulations required that carriers report any dangerous mail receptacles to their supervisors, the Appellant never made such a report concerning the mail slot in question (App. 7-8, 11-15).

After inserting the mail into the slot, the Appellant inserted his fingers to make certain that the mail had cleared the flap. As he removed his fingers, one of them got caught between the slot and the flap, and the tip of the finger was severed (App. 8).

The Appellant alleges that the Appellees negligently maintained and allowed to exist a mail slot and flap which operated in a dangerous manner so as to make it unsafe for postal carriers (App. 2). Even though postal regulations required that postal carriers were to report dangerous mail receptacles to their supervisors, the Appellant testified that he had never made such a report concerning the mail slot of the Appellees (App. 15, 21). A postal official testified

¹Mr. Marthinson died before the case was tried in United States District for the District of Columbia. Mrs. Marthinson was appointed Executrix of his estate.

that shortly after the accident he visited the Appellees' home for purposes of inspecting the mail slot and found it to be in good condition (App. 58-62). The Appellee, Ruth Coleman Marthinson, testified that she did not know how old the mail slot was but that to the best of her recollection the mail slot was put into the door after the door was obtained in 1949 (App. 57-58).

At the close of the Appellant's case in chief, the Appellees moved for a Directed Verdict on the grounds: that there had been no duty shown to exist and that there had been no breach of any duty (App. 44-45). The motion was overruled by the Court (App. 46-47).

At the close of all the evidence and subsequent to the Court's instructions to the jury, but before the case had been submitted to the jury, the Appellees renewed their motion for a directed verdict (App. 66). The Appellant made no objection to the Appellees' motion being made at this time or in this manner (App. 67).

The jury returned a verdict for the Appellant in the amount of \$25,000 (App. 68). In due course, the Appellees made a motion for a judgment notwithstanding the verdict, or in the alternative, for a new trial or remittitur (App. 69-70). The lower court denied the motion for a new trial or remittitur and granted the motion for judgment notwithstanding the verdict on the basis that the Appellant failed to establish that an unsafe condition or dangerous defect existed and that they failed to show that the Appellees knew, or in the exercise of reasonable care, should have known of any hazardous condition which could have been discovered by a proper and reasonable inspection (App. 97, 103-105).

ARGUMENT

1. THE LOWER COURT WAS CORRECT IN ITS DETERMINATION THAT THE APPELLEES' MOTION FOR A DIRECTED VERDICT MADE AT THE CLOSE OF ALL THE EVIDENCE AND SUBSEQUENT TO THE COURT'S INSTRUCTIONS TO THE JURY, BUT BEFORE THE CASE HAD BEEN SUBMITTED TO THE JURY FOR DETERMINATION, WAS TIMELY FILED.

The Appellant assigns error to the lower court's granting of the Appellees' motion for judgment notwithstanding the verdict on the basis that the Appellees failed to renew their motion for a directed verdict at the close of all the evidence and prior to the court's charge to the jury. Although they allege that the Appellees failed to comply with the procedural requirements necessary to preserve their right to make a motion for judgment notwithstanding the verdict, the Appellant fails to cite any authority to substantiate their position. On the contrary, the cases cited by the Appellant support the proposition that there is no rigid and formal procedure which must be followed in renewing for a motion for a directed verdict at the close of all the evidence, so long as it is made in time for the court to determine whether there is any question of fact to be submitted to the jury and whether any verdict other than the one directed would be erroneous as a matter of law. See *Martin v. Erie-Lackawanna Railroad Company*, 388 F.2d 802 (6th Cir., 1968); *Jack Cole & Company v. Hudson*, 409 F.2d 188 (5th Cir., 1969).

In the *Martin* case, the Defendant moved at the close of the Plaintiff's evidence for a directed verdict based on the insufficiency of the evidence. At the close of all the evidence and subsequent to the oral argument, but prior to the court's charge to the jury, the Defendant renewed its motion. The court held that the motion was timely made and that the Defendant's subsequent motion for judgment notwithstanding the verdict suffered no infirmity on this basis. *Id.* at 804-805.

In the *Jack Cole & Co. v. Hudson, supra*, the Defendants failed to renew their Motion for a Directed Verdict at the close of all of the evidence. While in the Judge's Chambers, the Defendant made a request that the jury be instructed to find for them. This was refused, as was a similar request made in open court after the Court's charge to the jury had been given. The 5th Circuit Court of Appeals held that:

"There can be no doubt that the trial judge was well aware of the reasons for the requested jury instruction, and, under the circumstances, we hold that this constitutes a sufficient predicate for the subsequent motion for judgment notwithstanding the verdict. *Roberts v. Pierce*, 398 F.2d 954, 956 (5th Cir., 1968)." At 191.

The *Roberts* case presented yet another variation of the manner in which a party may renew their motion for a directed verdict. Therein, the Defendants, at the conclusion of all the evidence, submitted to the trial judge their requested instructions Nos. 11-15 with the comment "we hand the Marshall instructions Nos. 11-15 which your Honor had previously considered and refused." The instructions Nos. 11 and 12 consisted of directions to the jury not to enter verdicts for the Plaintiff against either Defendant. In summarily dismissing the Appellant's objection to the manner in which the motion for a directed verdict was renewed, the court stated that, "it is our opinion that the Defendant's formal request that the jury be instructed to direct a verdict in their favor fulfills the requirements of Rule 50(b) for a motion. Appellant Roberts cites no cases which even suggest a contrary view." *Roberts v. Pierce, supra*, at 955-956. The same may be said of Appellant Lofty on this appeal.

The clear holding in the above-noted cases is that neither the letter nor the spirit of the Federal Rules of Civil Procedure requires the strict construction urged by the Appellant. The Appellant at-

tempts to explain away the damaging effect of these cases on their present position by emphasizing the distinction between the procedural situation in these cases and the situation presently before this Court (Brief for Appellant at 5-7). However, the ultimate result of Appellant's effort is to document the alternate ways in which a motion for a directed verdict may be renewed.

The essential and controlling fact is that the Appellees' motion for a directed verdict was renewed at the close of all the evidence and before the case was submitted to the jury. This is the sole requirement of Rule 50 regarding the preservation of one's right to move for judgment notwithstanding the verdict. That the motion was made after the Court's instructions to the jury is of no consequence, since the Court could have still withdrawn the case from the jury if it determined that there was no question of fact for them to consider.

The Appellant made no objection to the Court's acceptance of Appellees' motion for a directed verdict when it was made, and the Appellant does not now claim that he was prejudiced by the fact that the motion was renewed after the jury had been charged but before the submission of the case to them. Therefore, Appellees' subsequent motion for judgment notwithstanding the verdict suffers no infirmity and the sufficiency of the evidence may properly be reviewed on this appeal. See *Martin v. Erie-Lackawanna Railroad Co.*, *supra*, Rules 1 and 61, F. R. Civ. P.

Therefore, the Appellees urge this Court to find that the lower Court was correct in its determination that the Appellees' renewal of their motion for a directed verdict was timely filed.

II. THE LOWER COURT WAS CORRECT IN ITS GRANTING OF THE APPELLEES' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE BASIS THAT APPELLANT FAILED TO SHOW NEGLIGENCE ON THE PART OF THE APPELLEES AND APPELLANT'S FAILURE TO PROVE NOTICE OF ANY UNSAFE CONDITION OR DANGEROUS DEFECT.

Having considered all of the evidence in the light most favorable to the Appellant, the lower court concluded that the Appellant failed to prove any negligence on the part of the Appellees. It further concluded that the entire record failed to establish that the Appellees knew, or that in the exercise of reasonable care and caution, should have known of any hazardous condition which could have been discovered by a proper and reasonable inspection (App. 103).

In order to show negligence on the part of the Appellees, it was incumbent upon the Appellant to show that the Appellees owed a duty to him, and that the breach of such duty was the proximate cause of his injuries. See *Martin v. United States*, 96 U.S. App. D.C. 264, 225 F.2d 945 (1955); *Pennsylvania Railroad Company v. Pomeroy*, 99 U.S. App. D.C. 272, 239 F.2d 435 (1956); *Liberty Mutual Insurance Company v. B. Frank Joy Company*, 297 F. Supp. 592 (D.C.D.C. 1968). In the case presently before the Court, the Appellant had the burden of proving that the Appellees had actual or constructive notice of the alleged unsafe condition or defect in the mail slot. *Martin v. United States*, *supra*; *National Bank of Washington v. Dixon*, 112 U.S. App. D.C. 183, 301 F.2d 507 (1961); *Dommell v. Managers, Inc.*, 109 U.S. App. D.C. 370, 288 F.2d 154 (1961); *Newman v. United States*, 248 F. Supp. 669 (D.C.D.C. 1965). See *Whetzel v. Jess Fisher Management Company*, 108 U.S. App. D.C. 385, 282 F.2d 943 (1960). *Selby v. S. Kann Sons*, 64 App. D.C. 36.

In order to prove constructive notice, the Appellant attempted to show that a dangerous condition had existed for such a length of time that, had the Appellees exercised reasonable inspection of their premises, they would have known of the existence of a defect in the mail slot. However, a thorough review of the record by the lower court revealed that there was no evidence indicating that such an inspection would have uncovered any dangerous defect or condition in the mail slot (App. 101-102). *Century Indemnity Company v. Arnold*, 153 F.2d 531, cert. denied, 328 U.S. 854, (1946). A great deal of evidence was introduced into the record concerning the general condition and character of the Appellees' door and mail slot, none of which would permit a legitimate inference that any of these conditions were the proximate cause of the accident. In *Monahan v. Montgomery*, 216 A.2d 824 (Conn. 1966), a state court addressing a similar question held:

"... That the notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely the conditions naturally productive of that defect even though subsequently in fact producing it. On a question of notice, the trier's consideration must be confined to the Defendant's knowledge and realization of the specific condition causing the injury, and such knowledge and realization cannot be found to exist from a knowledge of the general or overall conditions obtaining on the premises."

In the final analysis, the Appellant's failure to confront the notice issue in his brief on this appeal is readily understandable. He could scarcely rebut the established facts that no difficulty was ever encountered in the use of the mail slot during over twenty years of continuous service prior to the accident; that the mail slot was never reported as dangerous or defective as required by postal regulations when such conditions exist; that shortly after the accident, a postal

official examined the mail slot and failed to report the existence of defects or dangerous conditions; that to this day, mail is still delivered through the same mail slot. In light of such a record, it must be inquired—How are the Appellees to be charged with knowledge of a dangerous condition when those who use the mail slot on a daily basis had no knowledge of such a condition? Certainly, a reasonable man is under no duty to inspect or maintain an instrumentality which he has no reason to suspect of malfunctioning. Yet, this is the duty of the Appellant seeks to impose on the Appellees.

III. THE LOWER COURT CORRECTLY PROHIBITED THE APPELLANT FROM INTRODUCING INTO EVIDENCE THE POSTAL REGULATION GOVERNING MAIL RECEPTACLES.

The lower court prohibited the introduction of the postal regulation governing mail receptacles (Title 39, § 45.4 of Code of Federal Regulations) on the basis that such a regulation was not pertinent to the issues before the Court (App. 42). Specifically, the Court ruled that the regulation was not a safety regulation for the protection of the general public and therefore the case of *Curtis v. District of Columbia*, 124 U.S. App. D.C. 241, 363 F.2d 973 (D.C. Cir. 1966) was not controlling.

The *Curtis* decision and *Klein v. District of Columbia*, ___ U.S. App. D.C. ___, 409 F.2d 164 (D.C. Cir. 1969), cited in the Appellant's brief are distinguishable from the case presently before this Court. Neither of the cases were concerned with the question of whether or not the statute under consideration was a safety regulation. The District of Columbia Building Code clearly was intended for the safety of the general public and it was therefore pertinent as a reasonable standard of care in maintaining public sidewalks in a safe condition. *Id.* at 166-67. The lower court in both cases refused the admittance of the Code into evidence solely on the basis

that the Code was inapplicable to previously built hinges. In this case, the Court had to determine whether or not the postal regulation was intended for the safety of the postman. The Court concluded that the primary purpose was to insure the safe delivery and security of the mails. Although the convenience of the postman was considered, there was no indication that the regulation was intended for the actual safety of the postman. Another distinguishing characteristic between the *Curtis* and *Klein* cases and the case presently before this Court may be found in the significance of the evidence once admitted. Had the Building Code been found to apply retroactively to the construction of the sidewalks in the *Curtis* and *Klein* cases, the Defendants would clearly have been in violation of it. Its applicability as a standard of care was therefore pertinent. No such determination could be made by the lower Court in this case.

The Appellees submit that had the postal regulation been admitted into evidence, it would have only served to prove that the Appellees complied with all of the requirements contained therein. The only affirmative requirements are that the mail slot be one and one half inches wide and seven inches long. The slot must have a flap hinged at the top if placed horizontally. (See Title 39, § 45.4 of Code of Federal Regulations). The Appellees' mail slot met these requirements. (App. 12, 13, 54). Although the diagram contained in the regulation shows that the flap opens outward, there is no requirement that the flap must open in this manner in order to comply with the regulation. Had the postal authorities intended such a specification, they surely would have provided for it in the textual part of the regulation. Such an interpretation is all the more compelling when it is realized that the postal authorities were cognizant of the numerous homes equipped with inward opening slots (App. 14, 16). That the Appellees' mail slot was never reported as being

defective, dangerous or in violation of the postal regulation, even after inspection by postal authorities, should be viewed as conclusive proof that the mail slot was in fact not in violation of the postal regulation.

It is also noted at this point that the Appellant's own expert witness, Mr. Lee L. Hulick, was not prepared to affirmatively testify that the Appellees' slot was in violation of the postal regulation (App. 42-44). Brief of Appellant at 11-12. The fact that he would testify that to his knowledge the Post Office Department has no regulation which would permit a mail slot with an inside flap is inconclusive and irrelevant. As we have already seen, the Post Office Department in *practice* permitted the delivery of mail through such slots and continues to do so today. The logical extension of the Appellant's line of reasoning leads one to the ridiculous conclusion that whatever is not affirmatively provided for in the regulation regarding specifications of mail slots may be construed as a violation of the regulation. This Court is urged to reject such fallacious reasoning.

CONCLUSION

Appellees respectfully submit that the lower Court properly granted the Appellees' Motion for Judgment Notwithstanding the Verdict and for the reasons stated herein, urge this Court to affirm the judgment below.

Respectfully submitted,

William H. Clarke

Galiher, Stewart & Clarke

1215 Nineteenth St., N.W.

Washington, D. C.

Counsel for Appellees

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